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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CASA VEERKAMP, S.A. DE C.V.
and WALTHER VEERKAMP,

Petitioners,

v.

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY D/B/A HERMES MUSIC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Inter-American Convention on Letters Rogatory is the mandatory and exclusive means for service of process from the courts of one signatory country, such as the United States, on a resident/citizen of one of the other fourteen signatory countries, absent some other agreement.

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PETITION FOR A WRIT OF CERTIORARI

Casa Veerkamp, S.A. de C.V.[1] ("Casa Veerkamp") and Walther Veerkamp (hereinafter collectively "Veerkamp" or "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

[1] Casa Veerkamp, S.A. de C.V. has no parent or subsidiary corporations to disclose under Rule 29.1.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, a1-a32) is reported at 22 F.3d 634. The opinions of the district court (App., *infra*, a33-a52) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 15, 1994 (App., *infra*, a1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY INVOLVED

Inter-American Convention of Letters Rogatory, done at Panama City, January 30, 1975, with additional Protocol and annex, done at Monte Video, May 8, 1979, entered into force for the United States on July 28, 1988. ___ U.S.T. ___, S. Treaty Doc. No. 27, 98th Cong., 2d Sess. (1984) (hereinafter referred to as the "Inter-American Convention" or "Convention"). (App., *infra*, a53-a80).

STATEMENT

Respondents sued Petitioners in the 139th Judicial District Court of Hidalgo County, Texas. Respondents requested service of process upon the Petitioners by certified mail in Mexico City through the Texas Secretary of State pursuant to the Texas Long-Arm Statute (Tex. Civ. Prac. & Rem. Code § 17.041). The Petitioners, citizens and residents of the United States of Mexico, removed the

case to the federal district court under 28 U.S.C. § 1441 on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332. The Petitioners then moved to dismiss, *inter alia*, on the basis that the method of service and the documents served failed to comply with the Inter-American Convention. The district court quashed service on this basis. (App. *infra*, a33-a34). After the Respondents failed to perfect service under the Convention on Petitioners within the following year, the district court dismissed the case. (App. *infra*, a43-a48). The court of appeals reversed after interpreting the Inter-American Convention as providing only a permissible, non-exclusive means for service of process on the citizen of a signatory country and remanded to the district court. (App., *infra*, a1-a32).

A. The Inter-American Convention

This case involves the construction of the Inter-American Convention on Letters Rogatory[2] and whether such treaty provides the exclusive means for service of process by citizens of one signatory country on the resident/citizens of another, absent any other agreement. The Inter-American Convention on Letters Rogatory is a multi-national treaty done in 1975 and designed to facilitate service of judicial documents in foreign countries which are signatories to the treaty. An Additional Protocol was added to the treaty in 1979 at the request of the United States to strengthen and facilitate international

---

[2] The signatories to the Convention are Argentina, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Spain, United States, Uruguay and Venezuela.

cooperation in judicial procedures provided for in the Inter-American Convention. At the time that President Reagan transmitted the Inter-American Convention to the Senate for advice and consent in 1984, only one member of the Organization of American States, other than the United States, was a signatory to the analogous Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). *See*, Treaty Doc. 98-27, p. III. 20 U.S.T. 361, T.I.A.S. 6638. With the advice and consent of the Senate, the United States became a party to the Inter-American Convention and Additional Protocol on July 28, 1988. Mexico is also a signatory nation to the Convention and Additional Protocol.

The Inter-American Convention and the Protocol contain 37 articles and, like the Hague Service Convention, sets forth a comprehensive procedure for the service of process. It requires that each signatory country establish a central authority to receive requests for the service of documents from other signatory countries. (App. *infra*, a54, art. 4 and a62, art. 2). Once a central authority receives the request in proper form, it must transmit the document to the appropriate local authority for service of the documents in accordance with applicable local law. (App. *infra*, a65, art. 4). The local authority must then attest to its execution and the central authority must certify the execution of the document in accordance with a prescribed form. (App. *infra*, a65, art. 4). As demonstrated below, the Inter-American Convention on Letters Rogatory mandates by its language, context and structure that letters rogatory are the exclusive means for service of

process by residents of one signatory country on the residents of another.

B. Proceedings Below

On November 4, 1991, Alberto Kreimerman, Hermes International, Inc., and Hermes Trading Company d/b/a Hermes Music (hereinafter collectively "Kreimerman" or "Respondents") filed an original petition against Petitioners, Electronica Solida Mexicana, S.A. and Jorge R. Mendez, alleging claims for libel, slander and civil conspiracy in the 139th Judicial District Court of Hidalgo County, Texas and requested service of process by certified mail upon all the defendants through the Texas Secretary of State pursuant to the Texas Long-Arm Statute. Tex. Civ. Prac. & Rem. Code § 17.041. The Respondents all reside and/or are domiciled in Hidalgo County, Texas. All the defendants reside in and/or are domiciled in the United States of Mexico. By December 23, 1991, the Texas Secretary of State had issued certificates confirming that the petition and citation were mailed to Casa Veerkamp and Walther Veerkamp, and that mail receipts had been signed by their agents.

On December 23, 1991, Veerkamp filed a Notice of Removal to the Southern District of Texas. Electronica Solida Mexicana, S.A. and Jorge R. Mendez did not appear. On December 30, 1991, Veerkamp filed a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b). Veerkamp's motion urged the court, *inter alia*, to quash service on the basis that the Inter-American Convention is the exclusive means for service in this instance and that Kreimerman's service under the Texas Long-Arm Statute

did not comply. On January 21, 1992, Plaintiffs filed a Motion to Remand and a Response to Defendants' Motion to Dismiss. By order entered on February 6, 1992, the Court denied all parties' motions, except it granted Veerkamp's motion to quash service and required that service be made pursuant to the Inter-American Convention. (App., *infra*, a33-a34). After one year had passed from the court's order quashing service and hearing evidence that nothing official had been done in Mexico to cause the letters rogatory to be served, the magistrate of the district court recommended on March 29, 1993 that the case be dismissed and the district court did so on April 3, 1993. (App., *infra*, a35-a48).

On May 20, 1993, Respondents timely perfected their appeal to the United States Court of Appeals for the Fifth Circuit. On June 15, 1994, the court of appeals issued its opinion affirming the district court in part, reversing in part, and remanding the case to the United States District Court for the Southern District of Texas, on the question of whether service was proper pursuant to the Texas Long-Arm Statute and if so, to proceed with the case on the merits. (App., *infra*, a1-a32). The court of appeals overruled the district court and held that the Inter-American Convention did not preempt all means for affecting service other than letters rogatory. (App., *infra*, a6-a24).

The court of appeals acknowledged that the question before it relating to the Inter-American Convention is *res nova* in the Fifth Circuit and all other United States Court of Appeals. (App., *infra*, a6). The court of appeals also acknowledged some of the rules of construction that this Court has announced apply to treaty construction and applied some of these rules while it chose to ignore

others. (App., *infra*, a7-a10). While these omissions are discussed below, the most critical errors are its failure to apply general rules of construction and its failure to follow this Court's rule of liberal construction of treaties. (App., *infra*, a7-a10). The court of appeals does not acknowledge a rule of construction that requires a document be interpreted so as to give effect to all provisions. The court of appeals does acknowledge a part of a rule of this Court that "treaties are more liberally construed than contracts." (App., *infra*, a9-a10), *citing Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S.Ct. 1489, 1493 (1991) (*citations omitted*). In spite of the lip service paid to this Court's rule of liberal construction of treaties, the court of appeals actually ignores the rule's plain meaning and relies on inferior authority to interpret the rule to hold that treaty provisions should be construed narrowly instead of liberally. (App., *infra*, a9, n. 17 & 18), *citing, The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A., No. 10 at 18-19; *In re: Extradition of Demjanjuk*, 612 F.Supp. 544, 555 (N.D. Ohio 1985); *The Case of S. S. Wimbleton*, [1923] P.C.I.J. Ser. A., No. 1, at 25. These errors foreshadow the court of appeals' holding with respect to the Convention.

At the heart of the court's analysis is its conclusion that the Inter-American Convention contains no plain statement of preemptive intent which it says this Court found critical in finding that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") did not preempt other methods of discovery. (App., *infra*, a11-a14); 23 U.S.T. 2555, T.I.A.S. No. 7444. However, the court of appeals' analysis is flawed because it failed to analyze the

context of the Hague Evidence Convention in which this Court found the absence of such a preemptive statement so crucial. In addition, it also failed to compare and contrast the context of the Hague Evidence Convention to the context of the Inter-American Convention. (App., *infra*, at a11-a18). As shown below, in the Inter-American Convention, these factors support preemption.

Based on its erroneous analysis, the court of appeals concluded by finding that the Inter-American Convention was merely a safe harbor providing a simple and certain means but not the exclusive means by which a party may serve process on a foreign national in a signatory country. (App., *infra*, a22).

REASONS FOR GRANTING THE PETITION

Although the Inter-American Convention was entered into by the United States in July of 1988 this is the first court of appeals' opinion on this treaty and it is wrong. Given this country's rapidly increasing trade with Mexico since the ratification of the North American Free Trade Agreement, it is timely for this Court to determine if the Inter-American Convention must be utilized for service between the two countries, as well as the thirteen other signatory countries. This is an important question of federal law which has not been, but should be settled by this Court.

I. The Court of Appeals' Interpretation of the Inter-American Convention is Erroneous Given the Language, Context and Rules of Construction.

This Court's rules of treaty construction which require that the Inter-American Convention be found to be mandatory are as follows. The role of the court in treaty interpretation is limited to ascertaining and enforcing the intent of the treaty parties. *Sumitomo Shoji America, Inc. v. Arigliano*, 457 U.S. 176, 102 S.Ct. 2374, 2377 (1982). In interpreting an international treaty, it is in the nature of a contract between nations. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 253, 104 S.Ct. 1776, 1783 (1984). The analysis therefore begins with the words of the treaty and the context in which the written words are used. *Air France v. Saks*, 470 U.S. 382, 397, 105 S.Ct. 1338, 1341 (1985). Treaties are construed more liberally than private agreements, however, and a court may look beyond the written word to the treaty's history, to the negotiations and the practical construction adopted by the parties may also be relevant. *Id.* 470 U.S. at 396, 105 S.Ct. at 1341. Other general rules of construction may be brought to bear on difficult or ambiguous passages. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104, 2108 (1988).

The words and context of the Inter-American Convention and Additional Protocol with the application of rules of construction establish that it preempts all other means of service of process absent some other agreement. This is in spite of the fact that there is not a provision in the Convention that expressly states that all other means of service in civil or commercial cases are prohibited or preempted by the Convention. Rather Article 2 states that

the Convention is applicable in civil and commercial cases in the states parties and only provides for one method of service of process, letters rogatory. (App., *infra*, a53). The Convention imposes on the states parties the obligation to execute service on its subjects. (App., *infra*, a54-a56, art. 5 & 10; a65, art. 4). The Convention excepts from its application methods and procedures for service other than letters rogatory, only when such procedures have been agreed to directly between the states parties, themselves. (App., *infra*, a57-a58, art. 14 & 15). However, there is no exception in the Convention that allows one of the states parties to continue its own means and methods of service unilaterally. The additional protocol and the treaty history that is available, further demonstrate the intent of the states parties to the Convention to prohibit means of service other than letters rogatory. Each of these points is discussed in detail below.

Article 2, "SCOPE OF THE CONVENTION" expressly provides as follows:

> Article 2
>
> This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial or other adjudicatory authority of one of the States Parties to this Convention, that have as their purpose:
>
> a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad; (App., *infra*, a53).

Thus by agreeing to the Convention, the signatory states parties are agreeing that the terms of the Convention

shall apply to letters rogatory used for service of process in civil and commercial matters. Petitioners do not suggest that this language by itself preempts other means of service of process, but it is important that it does not recognize, permit or otherwise allow any other method of service of process.

The Preamble to the Additional Protocol to the Convention which was proposed by the United States, adds support to the preemptive interpretation of the Convention. The Preamble states it was entered into for the purpose of strengthening and facilitating international cooperation in judicial procedures as provided in the Inter-American Convention and to provide for the more effective service of judicial documents. (App., *infra*, a62). In addition, the Scope of the Protocol is set forth in Article 1 and it clarifies that the Protocol itself applies only to the performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad, again demonstrating the intent to limit the preemptive impact of the Convention. (App., *infra*, a62). The Additional Protocol is not limited to these acts only when they are accomplished by letters rogatory, but rather provides that these acts can be accomplished only by means of letters rogatory. (App., *infra*, a62-a70). The Additional Protocol thus supports the intended exclusivity of such means of service.

The only exceptions for methods of service of process other than letters rogatory are set forth in Articles 14 and 15 of the Convention. These Articles permit the use of other means and methods **only when the states parties have agreed to such other means and methods between themselves**. (App., *infra*, a57-a58). The Convention does

not contain an exception that allows one of the states parties to unilaterally impose methods of service on others. Articles 14 & 15 provide as follows:

VI. GENERAL PROVISIONS

Article 14

> States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious that those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

> This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.
> (App., *infra,* a57-a58).

The court of appeals completely ignored Article 14 in its analysis. (App., *infra,* a11-a18). Article 14 is an exception that expressly allows more expeditious procedures only when agreed to by the States Parties that belong to economic integration systems.[3] (App., *infra,* a57-a58). The

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[3] The Department of State suggests that Article 14 applies only to special methods and procedures relating to letters rogatory, however, nothing in the language of Article 14 suggests such a limitation. Treaty Doc. 98-27, p. VIII.

provision does not recognize or permit the continuation of methods and procedures used unilaterally by one of the states parties. Indeed Article 14's relative position as the first article under the heading of general provisions, dictates that it be read broadly. This Court's rules governing treaty construction also dictates that it be read liberally. Simply put, the words of this Article provide one exception to the general applicability of the Inter-American Convention for more expeditious procedures agreed to by members of economic integration systems.

Article 15 which follows Article 14 in the General Provisions excepts from the reach of the Convention less restrictive service provisions agreed to between states parties in bilateral or multilateral agreements. (App., *infra*, a58). This Article provides that more favorable service practices that may have been agreed to or practiced by states parties to bilateral or multilateral agreements are not preempted by the Convention and may continue. (App., *infra*, a58). Again the Article does not provide that unilateral practices may continue. (App., *infra*, a58). Moreover, the Department of State's comment on Article 15 in its report on the Convention to President Reagan states:

> Article 15 permits Contracting States either to continue in force agreements with less restrictive provisions, or to enter into such agreements in the future. It further authorizes the continuance of practices between states concerning letters rogatory which may be less restrictive than those prescribed by the Convention. For example, service by mail or by a private process-

> server may continue to be employed if authorized by the law of the State of destination. Treaty Doc. 98-27, p. VIII.

The court of appeals did not ignore Article 15 in its analysis as it did Article 14. However, while it recognizes that it is "difficult" to dispose of this provision, the court does so by dismissing the Department of State's comment as "modest support" and engages in an unreasonably narrow construction of the second clause of Article 15 to find that it *permits* unilateral practices of countries to continue. (App., *infra*, a15-a17). This analysis by the court of appeals is strained and erroneous.

First, the court does not properly divide the clauses. (App., *infra*, a15). The second clause of Article 15 reads "This convention shall not . . . preclude the continuation of more favorable practices by these States." (App., *infra*, a58). Second, the court of appeals ignores the context of Article 15 that it addresses bilateral and multilateral agreements, just as Article 14 addressed economic integration systems. (App., *infra*, a15-a17, a58). By ignoring the context of Article 15, the court of appeals interprets this clause on a stand-alone basis and concludes that this clause indicates nothing about whether these practices must be agreed by the parties, when in fact the subject of the Article is bilateral and multilateral agreements. (App., *infra*, a15-a17, a58). Third, the court of appeals deletes the words "these States" from the clause and substitutes "contracting States" to interpret the clause to permit more favorable unilateral practices of any contracting state. (App., *infra*, a15-a16). If the drafters had intended to refer to all countries to the Convention, as suggested by the court of appeals, they would have used the term

"States Parties" which is used throughout the Convention, rather than "these States." (App., *infra*, a53-a61). The term "these States" is used in this clause to refer back to States Parties that have signed or may sign bilateral or multilateral agreements in the first clause and to permit more favorable practices that may be followed by *these states* in such agreements. (App., *infra*, a58). Fourth, the court of appeals erroneously interprets "practices in this regard" to refer to practices relating to letters rogatory. (App., *infra*, a16-a17). This again ignores the context of Article 15 and would render the second clause redundant with the first clause as the first clause already permits provisions relating to letters rogatory in agreements. (App., *infra*, a58). Literally and certainly when read liberally, this second clause is meant to broadly permit the continuation of practices that have been followed by states parties that are also parties to bilateral and multilateral agreements. Moreover, given that the first clause permits less restrictive provisions with respect to letters rogatory, the purpose of the second clause is to permit service of process by means in addition to letters rogatory.

As demonstrated the court of appeals' disregard of Article 14 and its unreasonable attempts to dispose of Article 15, does not adhere to applicable rules of treaty construction and is erroneous. The purpose of Articles 14 and 15 is to clearly provide exceptions from the Convention's required use of letters rogatory.

The court of appeals concluded that the Convention is merely a "safe harbor" – a dependable mechanism – but not necessarily the only lawful mechanism – by which they may effect service on defendants residing in

another signatory nation. (App., *infra*, a22). This interpretation by the court of appeals means that there is no need for exceptions to the Inter-American Convention because all other means and methods of service that were available prior to the Convention would continue to be available after ratification of the Convention. The court of appeals' interpretation means that Articles 14 and 15 have no effect. Under the court of appeals' interpretation, members of economic integration systems would continue to have available all "methods and procedures more expeditious than those provided for in the Convention" without Article 14. Under the court of appeals' interpretation, parties to bilateral and multilateral agreements would be able to use all provisions relating to letters rogatory or other more favorable practices that may be contained in their agreements without Article 15. This construction of the Convention by the court of appeals ignores and in fact violates a general rule of construction.

The general rule of construction that the court of appeals' interpretation violates is set forth in the Restatement of Contracts as follows:

> § 203. Standards of Preference in Interpretation.
>
> In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable;
>
> (a) an interpretation which gives a reasonable lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
>
> Restatement (Second) of Contracts § 203 (1982).

The court of appeals' interpretation renders Articles 14 and 15 as having no effect and, thus, is a violation of this general rule of construction. The Inter-American Convention does not expressly state that all other methods of service are preempted by the Convention. (App., *infra*, a53-a70). Rather the Convention sets forth the procedures for the permissible means of service, i.e., letters rogatory, and then excepts other means and methods of service that have been agreed to by the states parties either as a result of economic integration systems or bilateral or multilateral agreements. (App., *infra*, a53-a70). This construction is not a leap of logic as the court of appeals states, but rather is the proper construction of the Convention based on a fundamental general rule of construction that this Court has said is applicable to treaties as contracts between nations.

II. The Court of Appeals Erred in Its Analysis of The Inter-American Convention *vis a vis* The Hague Service and Evidence Conventions

Application of the same analysis to this Convention that this Court applied to the Hague Service Convention and the Hague Evidence Convention to determine if they were mandatory or permissive, demonstrates that the Inter-American Convention, like the Hague Service Convention, is mandatory.

Article I of the Hague Service Convention provides:

> The present convention shall apply in all cases, in civil or commercial matters, where there is

> occasion to transmit a judicial or extrajudicial document for service.

20 U.S.T. 361, 362, T.I.A.S. No. 6638.

Based on the strength of this language, the Convention has been interpreted as being mandatory. *Societé Nationale v. U. S. Dist. Court, S.D. Iowa*, 482 U.S. 522, 534, n.15, 107 S.Ct. 2542, 2550 n.15 (1987).

The Hague Evidence Convention, however, has been held to be applicable only on a case-by-case basis. *Id.*, 482 U.S. at 540-41, 107 S.Ct. at 2553. This Court reached this conclusion only after a complete review of the Convention. The preamble of the Evidence Convention states as its purpose: "to facilitate the transmission and execution of letters of request" and to "improve mutual judicial cooperation in civil or commercial matters." 23 U.S.T. at 2557, T.I.A.S. No. 7444. However, this Court did not stop its analysis at this language in the preamble. Nor did this Court find or even suggest that because the Hague Evidence Convention only referred to and applied to "Letters of Request" that other means of taking evidence were not precluded. 482 U.S. at 534, 107 S.Ct. at 2550; *Compare* App., *infra*, a11-a12. Before reaching its conclusion, this Court also looked at the context of the Evidence Convention and the language used throughout the Evidence Convention, finding that the word "may" was used throughout rather than the mandatory "shall." 482 U.S. at 535. 107 S.Ct. at 2551. In addition, this Court considered that Article 23 of the Evidence Convention allows a signatory country to declare that it will not execute a letter of request in aid of pretrial discovery in a common law

country. 482 U.S. at 536-538, 107 S.Ct. at 2551-2552. Perhaps most persuasive to this Court was the fact that Article 27 of the Evidence Convention *expressly* provided that the Convention shall not prevent a contracting state from "permitting by internal law or practice, methods of taking evidence other than those provided for in this Convention." 482 U.S. at 538, 107 S.Ct. at 2552-53. Finally, this Court also stated that the interpretation of the Evidence Convention as exclusive would allow the courts of another country to regulate pretrial discovery in a case pending in another country. 482 U.S. at 539-40, 107 S.Ct. at 2553. It was based on this language and context of the Hague Evidence Convention that this Court held that such convention was permissive.

Article 2 of the Inter-American Convention is very similar to Article I of the Hague Service Convention. Both use the mandatory word "shall" and apply in commercial and civil cases for service of process abroad. The differences between the two are explained by the fact that letters rogatory is the exclusive means for service under the Inter-American Convention, while the Hague Service Convention permits various means of service. (App. *infra*, a53). 20 U.S.T. 361, T.I.A.S. No. 6638. The main difference is that the word "all" is not used in the Inter-American Convention, but it is used in the Hague Service Convention. However, "all" would be superfluous in the context of Article 2 of the Inter-American Convention, as it assumes that in any case where service abroad is sought, a letter rogatory will issue.

In contrast, unlike the Hague Evidence Convent mandatory language is used throughout the Inter-Am can Convention. For example, Article 5 requires that ters rogatory *shall* be executed by the receiving coun (App., *infra*, a54-a55). The Hague Evidence Convent provides that it "may" be done. 482 U.S. at 535, 107 S at 2551. In addition, the Inter-American Convention, the Hague Service Convention, provides only a very n row exception to the mandatory obligations it impose a state of destination to serve a letter rogatory. The Ha Service Convention which has been interpreted as m datory does contain an exception that allows a signat state to refuse to honor a request for service in instan where compliance would infringe upon the state of de nation's "sovereignty or security". 20 U.S.T. 361, 364, 13, T.I.A.S. No. 6638. The Inter-American Convent likewise provides a narrow exception that a state of de nation may refuse to execute a letter rogatory whic "manifestly contrary to its public policy." (App., *in* a58, art. 17). Thus, throughout the Inter-American C vention it mandates that states parties shall perform procedures, rather than providing that they may be do

The court of appeals does purport to look at context of the Inter-American Convention in dismiss the Petitioners' preceding arguments concerning man tory language. The court of appeals dismisses the ex ination of the language stating that in the Convention the mandatory language refers to what must be d with respect to letters rogatory, but none of it indic that the Convention's procedures exclude other mean service. (App., *infra*, a11-a14). However, this misses point. In *Societé Nationale, supra*, this Court reviewed

procedures under the Hague Evidence Convention and found: (i) a judicial authority in one contracting state *may* forward a letter of request; and (ii) diplomatic officers, consular agents, and commissioners *may* take evidence. 482 U.S. at 535, 107 S.Ct. at 2551. This Court found that the absence of any command that a signatory state must use the Hague Evidence Convention procedures conspicuous and supported this Court's conclusion that such Convention was permissive. *Id.* By comparison the Inter-American Convention mandates that states parties follow the procedures set forth subject to the two exceptions discussed above. Thus, the court of appeals' disposal of this argument fails to properly apply the precedent of this Court and ignores the mandatory provisions of the Convention.

III. The Available Treaty Documents and General Principles of Comity Support an Interpretation of the Inter-American Convention as Mandatory.

The fact that the Inter-American Convention applies exclusively to service of process between signatory states is also supported by the documents relating to its consent and ratification by the United States Senate.[4] President Reagan, in his letter of transmittal to the Senate, stated that the Inter-American Convention would create a level of international cooperation among the Organization of American States analogous to that among the signatories to the Hague Service Convention. Treaty Doc. 98-27, p. I.

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[4] No documents relating to the negotiation of the Convention or Additional Protocol have been published.

Likewise, both the Department of State in its report su
mitted to the President and the Senate Committee
Foreign Relations in its report to the Senate, equate t
Inter-American Convention to the Hague Service Co
vention. Treaty Doc. 98-27, p. III; Exec. Rept. 99-2
Nowhere in any of these materials is it noted by t
Executive or Legislative Branch of the government th
the Inter-American Convention is unlike the Hague Se
vice Convention because its provisions for service
Letters Rogatory are permissive and not mandatory. N
comments indicate that internal laws or practices of t
state of transmission, such as service by mail, can co
tinue in the absence of an agreement. There is such la
guage in treaty documents of the Hague Eviden
Convention. *See*, 482 U.S. at 535 n. 19, 107 S.Ct. at 2551
19. While there is express language that the Convention
mandatory, the Executive and Legislative Branches of t
federal government gave no indication that the Inte
American Convention would not be the exclusive meth
for service with signatory countries.

In agreeing to enter into the Inter-American Conve
tion, the United States recognized the right of forei
governments, including the government of Mexico,
agree to this method of service within their borders, a
to reject all others. Mexico, like the United States, is
sovereign state; it would be unfair to ignore her reserv
tions to the Convention as to service of her citize
within Mexico. *See*, 482 U.S. at 543-44, n.27, 107 S.Ct.
2555-56, n.27. In a civil law nation such as Mexico, it
traditionally required that legal documents be served
a government official or through some other official cha
nel. R. Doak Bishop, *International Litigation in Texas*,

Baylor L. Rev. 131 n.12-17 (1984). Therefore private parties, without intervention of the state, are unable to perform such acts. *Id.* In fact, an attempt at service without the intervention of the Mexican government, may constitute the performance of an illegal act. *Id.* Given these restrictions, the principles of sovereignty and comity dictate that the provisions of the Convention be applied in this situation.

CONCLUSION

For these reasons, including the United States' obligations under the Inter-American Convention, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Alberto KREIMERMAN, et al.,
Plaintiffs-Appellants,

v.

CASA VEERKAMP, S.A. de C.V.,
et al., Defendants-Appellees.

No. 93-2403.

United States Court of Appeals,
Fifth Circuit.

June 15, 1994.

Appeal was taken from order of the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J. quashing service on Mexican defendants under Texas long-arm statute. The Court of Appeals, Wiener, Circuit Judge, held that (1) Inter-American Convention on Letter Rogatory did not preempt all other conceivable means for effecting service on defendant who resided in Mexico; (2) removal of action to wrong division of right district create procedural, rather than jurisdictional defect and could be remedied by transferring case to correct division; and (3) district court did not abuse its discretion in refusing to extend time to effect service.

Affirmed in part, reversed in part, and remanded with instructions.

Jan R. Thurman, Annette R. Lloyd, Thurman, Harrison & Steck, Arlington, TX, for appellant.

James A. Porter, Williams & Martin, Houston, TX, for Casa Veerkamp.

Appeal from the United States District Court for th Southern District of Texas.

Before KING and WIENER, Circuit Judges, an ROSENTHAL,* District Judge.

WIENER, Circuit Judge.

Plaintiffs-Appellants Alberto Kreimerman, Herme International, Inc. and Hermes Trading Company d/b/ Hermes Music (collectively "Kreimerman et al.") sue Defendants-Appellees Casa Veerkamp, S.A. de C.V. Wal ter Veerkamp, Electronica Solida Mexicana, S.A., an Jorge R. Mendez (collectively "Veerkamp et al.")[1] fo libel, civil conspiracy, and slander. Kreimerman et a served process on the defendants, all of whom are resi dents of Mexico, by direct mail through the Texas Secre tary of State under the Texas Long-Arm Statute,[2] but th district court quashed this service, holding that the Inter American Convention on Letters Rogatory (the Conven tion),[3] a multi-national treaty designed to facilitate ser vice of letters rogatory among the signatory nations, wa the exclusive means of effecting service on the defen dants. After Kreimerman et al. tried long and hard – bu unsuccessfully – to accomplish service on the defendant

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*District Judge of the Southern District of Texas, sitting by des ignation.

[1] Electronica Solida Mexicana, S.A. and Jorge R. Mendez have not appeared and are not parties to this appeal.

[2] Tex.Civ.Prac. & Rem.Code § 17.041, *et seq.*

[3] Inter-American Convention on Letters Rogatory (here inafter "the Convention"), January 30, 1975, S. TREATY DOC. No. 27, 98th Cong., 2d Sess. (1984).

through the use of letters rogatory pursuant to the Convention, they appealed the district court's decision to quash their service on the defendants under the Texas Long-Arm Statute, arguing – inter alia – that the Convention does not preempt other methods of service. They also appealed that court's refusal to grant a third extension of time within which service could be accomplished pursuant to the Convention.

I

FACTS AND PROCEEDINGS

Alberto Kreimerman is the sole owner and stockholder of Hermes Music and Hermes International, Inc., which sell numerous music related products. Both companies have their principal places of business in Hidalgo County, Texas, where Kreimerman resides. Walter Veerkamp, who resides in Mexico, D.F. (Mexico City), in the United States of Mexico (Mexico), is the owner of Casa Veerkamp, S.A. de C.V., which also sells music related products and which has its principal place of business in Mexico.

Kreimerman et al. sued Veerkamp et al. in Texas state court for libel, conspiracy, and slander,[4] serving process on all defendants through the Texas Secretary of State under the

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[4] Kreimerman claimed that he was defamed when Veerkamp sent copies of an article from a Mexican political magazine and explanatory cover letters to some of Kreimerman's suppliers. The article (and the accompanying cover letters) apparently accused Kreimerman of being involved in drug trafficking, gun running, and money laundering.

Texas Long-Arm Statute. Veerkamp et al. removed the ca to the United States District Court for the Southern Distri of Texas, Houston Division. They also moved to dismiss th action for lack of jurisdiction and improper servic Kreimerman et al. responded to Veerkamp et al.'s motio and requested that the case be remanded to state court o alternatively, that it be transferred to the McAllen Division the Southern District of Texas, which was the proper venu division for the case.[5] The court denied all motions excep the motion to quash service, which it granted on the groun that the Convention established the exclusive means serving process on defendants residing in a signatory Stat

Following the court's decision to quash service unde the long-arm statute, Kreimerman et al. moved to exten the time to serve all defendants and requested the distri court to issue four letters rogatory for service of proces under the terms of the Convention. The letters wer issued and forwarded to Mexico by Kreimerman et al. American counsel to be served on the defendants. Kre merman et al. retained Mexican counsel in Ciudad Juare (on the Mexican side of the Rio Grande River, across fro El Paso, Texas) to receive the letters and assist with suc service. This counsel in turn hired another Mexican atto ney, whose firm had offices in Mexico City, where th letters rogatory had to be filed. During the ensuin months, Kreimerman et al.'s Mexican counsel reporte that the letters had been received and filed with th Federal District Court of Mexico, but that they had no

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[5] We address the issue of removal to the wrong divisio later.

yet been served, apparently because of the limited personnel available to serve process in international cases. As his time to effect service ran out, Kreimerman et al. requested a second extension of time to serve the defendants, and this request was granted too.

Prior to the expiration of the third deadline, Kreimerman et al.'s counsel in Mexico represented that service of the letters rogatory had been effected, but that there would be a delay in processing the returns. Kreimerman et al. wrote to the court, notifying it that service had been effected, but that additional time was needed to obtain properly certified copies. Only after Veerkamp et al. subsequently moved for sanctions against Kreimerman et al.'s counsel for misrepresenting that service had been effected, did Kreimerman et al. learn that service had not in fact been effected. Apparently, the lawyer in Mexico City had continually misrepresented the true situation.

Kreimerman et al. again moved (for the third time) for additional time to complete service of letters rogatory in Mexico. The magistrate judge conducted an evidentiary hearing in which Kreimerman et al.'s motion to extend time for service and Veerkamp et al.'s motion to dismiss the action and issue sanctions were reviewed. At the hearing, the magistrate judge denied Kreimerman et al.'s motion for a third extension, concluding that they would not be prejudiced by a dismissal because the applicable statute of limitations had been tolled while the suit was pending.[6] The magistrate judge also found that sanctions were not

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[6] These statutes of limitations presumably related to Kreimerman et al.'s actions against Veerkamp et al. under Texas law for libel, civil conspiracy, and slander.

appropriate, but recommended that Kreimerman et al.'s case be dismissed without prejudice, thereby permitting them to refile later.

Kreimerman et al. filed written objections to the magistrate judge's recommendations, but the district court adopted them and dismissed the case before the timely-filed written objections were received by the court. Kreimerman et al. then moved for reconsideration but their motion was denied.[7] This appeal followed.

II

ANALYSIS

A. *Preemption*

The central question in this case is whether the Convention preempts all other conceivable means for effecting service on defendants who reside in Mexico. To the best of our knowledge, this question is *res nova* in this and all other United States courts of appeals. Significantly, the question whether service under the Texas Long-Arm Statute was validly accomplished under the facts of this case is *not* before us; neither does our interpretation of the Convention turn on the existence *vel non* of alternative methods of service that comport with notions of comity and other requirements of domestic and international law. Here, we simply need to determine

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[7] Kreimerman et al. also made a motion to reinstate the motion for reconsideration, or – if you will – to reconsider the motion for reconsideration.

whether the language, history, and purpose of the Convention indicate that it was devised to supplant all other means of effecting service on a defendant residing in a signatory nation other than the forum nation.

1. *Standards For Construing the Convention*

In construing a treaty – as in construing a statute – we begin with the language or text.[8] The text of a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[9] Only when the language of a treaty – read in the context of its structure and purpose[10] – is ambiguous may we

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[8] *United States v. Alvarez-Machain*, 504 U.S. ___, ___, 112 S.Ct. 2188, 2193-94, 119 L.Ed.2d 441, 451-52 (1992); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486, U.S. 694, 699, 108 S.Ct. 2104, 2108, 100 L.Ed.2d 722 (1988); *Air France v. Saks*, 470 U.S. 392, 397, 105 S.Ct. 1338, 1341, 84 L.Ed.2d 289 (1985); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35, 109 S.Ct. 1676, 1683-84, 104 L.Ed.2d 113 (1989).

[9] Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 8 I.L.M. 4 (1969) (hereinafter "Vienna Convention"); *accord Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) (clear import and obvious meaning of treaty language control). Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part III, introductory note (1986).

[10] Although several cases specify that the language of a treaty must be read "in context," *see, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 111 S.Ct. 1489, 1493, 113 L.Ed.2d 569

resort to extraneous information like the history of
treaty, the content of negotiations concerning the trea
and the practical construction adopted by the contract
parties.[11] We have no dispensation "to alter, amend,
add to any treaty, by inserting any clause, whether sm
or great, important or trivial. . . . "[12] Indeed, any su
effort on our part "would be . . . an usurpation of pow
and not an exercise of judicial function."[13] Neither m
we supply a *casus omissus*, for we have no authority

(1991); *Schlunk*, 486 U.S. at 699, 108 S.Ct. at 2108, these cases
not define the word "context." As the language of a treat
again, read in context – is regularly contrasted with informat
extraneous to the treaty (like the *travaux preparatoires), see, e*
Eastern Airlines, Inc., 499 U.S. at 535, 111 S.Ct. at 1493; *Chan*,
U.S. at 134, 109 S.Ct. at 1683-84, we can infer that the context
treaty consists of insights drawn from the treaty docum
itself. Article 31(2) of the Vienna Convention confirms this inf
ence, for it defines the context of a treaty as the text *"includ*
its preamble and annexes," as well as contemporaneous inst
ments and agreements made by the parties to the treaty
connection with the conclusion of treaty." Emphasis add
Obviously, inferences drawn form a treaty's structural organi
tion (e.g., the titles of its articles and parts) are also part of
contextual analysis of a treaty. Such contextual analysis can a
should inform our understanding the literal language of a tre
provision. Thus, when a court speaks of interpreting the l
guage of a treaty in the context of its structure and purpose
means construing the literal language of the treaty in light of
structural organization and its purpose – as reflected in
preamble and other parts of the treaty.

[11] *Eastern Airlines, Inc.*, 499 U.S. at 535, 111 S.Ct. at 14
Chan, 490 U.S. at 135, 109 S.Ct. at 1684.

[12] *Chan*, 490 U.S. at 135, 109 S.Ct. at 1684 (quoting
Amiable Isabella, 19 U.S. (6 Wheat.) 32, 5 L.Ed. 191 (1821)).

[13] *Id.*

rewrite a treaty.[14] These canons of interpretation, however, do not indicate which of several competing interpretations we should favor in close cases.

Courts commonly declare the treaties are more "liberally construed" than contracts.[15] This does not mean, however, that treaty provisions are construed broadly. Rather, this "liberal" approach to treaty interpretation merely reflects – as indicated above – the willingness of courts, when interpreting difficult or ambiguous treaty provisions, to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[16] Indeed, existing precedents – though sparse – suggest that treaty provisions should be construed narrowly rather than broadly.[17] As treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly – for fear of waiving sovereign rights that the government or people of the State never intended to cede.[18] Ambiguous provisions of a treaty should thus be interpreted to derogate

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[14] *Id.*

[15] *See, e.g., Air France v. Saks*, 470 U.S. 392, 396, 105 S.Ct. 1338, 1341, 84 L.Ed.2d 289 (1985); *Eastern Airlines, Inc.*, 499 U.S. at 535, 111 S.Ct. at 1493.

[16] *Eastern Airlines, Inc.*, 499 U.S. at 535, 111 S.Ct. at 1493 (citations omitted).

[17] *See, e.g., The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No. 10 at 18-19; *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 (N.D.Ohio 1985) (citing the *S.S. Lotus* case for the proposition that the jurisdiction [to adjudicate] of sovereign States is unbounded unless explicitly prohibited).

[18] As "[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by

minimally from the sovereign power of the State, which is the quintessential and most legitimate entity in international law.[19]

2. *Discussion*

The parties advance both textual (and contextual)[20] and non-textual (or extraneous) arguments in support of their respective interpretations of the Convention. Although the district court was persuaded that Kreimerman et al.'s attempt to serve process under the Texas Long-Arm Statute contravened the Convention, that court did not reveal with arguments it found especially telling. The absence of the trial court's reasons are inconsequential here, though, as the interpretation of treaty provisions is a question of law, freeing us to review the

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usages generally accepted as expressing principles of law . . . [r]estrictions upon the independence of States *cannot* therefore be presumed." *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No. 10 at 18-19 (emphasis added); *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 (N.D.Ohio 1985) (citing the *S.S. Lotus* case for the proposition that the jurisdiction [to adjudicate] of sovereign States is unbounded unless explicitly prohibited); *see also The Case of S.S. Wimbleton*, [1923] P.C.I.J. Ser. A, No. 1, at 25 (indicating that international treaties place restrictions on the exercise of the sovereign rights of signatory States).

[19] In this case, however, it turns out that the arguments weigh rather more heavily on one side than the other. Thus, we need not rely on any canon of interpretation to determine the outcome in this case: It is simply not that close.

[20] *See supra* footnote 10.

district court's conclusion *de novo*.[21] We consider the parties textual and non-textual arguments in turn.

a. *Textual Arguments*

The only federal court to have reached the issue in a published opinion concluded that the Convention is *not* the exclusive means of serving process on defendants residing in a signatory State.[22] In so concluding, that court emphasized that the Convention does not expressly prohibit other means of service: The Convention "states that it shall apply to letters rogatory . . . [but it] does not state that letters rogatory are the only means of serving process in the signatory countries."[23]

This is a telling dichotomy. The Convention does indeed merely state that it "shall apply to letters rogatory,"[24] rather than to any and all means of serving process. In contrast, the Hague Service Convention – by its own terms – "appl[ies] *in all cases*, in civil or commercial matters, *where there is occasion to transmit a judicial . . . document for service abroad.*"[25] Similarly, the official title of

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[21] *Sioux Tribe v. United States*, 205 Ct.Cl. 148, 500 F.2d 458, 462 (1974); *Cayuga Indian Nation of New York v. Cuomo*, 758 F.Supp. 107, 111 (N.D.N.Y.1991).

[22] *Pizzabiocche v. Vinelli*, 772 F.Supp. 1245, 1249 (M.D.Fal.1991).

[23] *Id.*

[24] The Convention, ART. 2.

[25] Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. 1, 20 U.S.T. 361, T.I.A.S. No. 6638 (hereinafter "Hague Service Convention") (emphasis added).

the Convention is the Inter-American Convention on *Le*
ters Rogatory, whereas the official title of the Hague Se
vice Convention is the Convention on the *Service Abro*
of Judicial and Extrajudicial Documents in Civil or Comme
cial Matters.[26] As rogatory letters (or letters of reques
are – by definition – merely one of many procedur
mechanisms by which a court in one country may reque
authorities in another country to assist the initiating cou
in its administration of justice,[27] the Convention's scop
appears to be limited to regulating that one procedur
mechanism. In contrast, the scope of the Hague Servic
Convention is much broader, applying as it does to *a*
service abroad upon defendants residing within signato
States.

This facial difference in scope is reinforced by
comparison of the preambles of the two agreements. Th
Convention's preamble is rather modest: "The Gover
ments of the Member States . . . desirous of concluding
convention on letters rogatory, have agreed as fo
lows. . . . "[28] The language of the Hague Service Conve
tion is more peremptory: "Desiring to create appropria
means to *ensure* that judicial and extrajudicial documen
to be served abroad *shall be* brought to the notice of th
addressee in sufficient time. . . . "[29]

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[26] *Id.* (emphasis added).

[27] *See, e.g.,* Fed.R.Civ.P. 4(f) & 28(b) (in which letters rog
tory are listed as but one of several possible means of effectin
service upon or deposing foreign residents).

[28] The Convention, preamble.

[29] The Hague Service Convention, preamble (emphas
added).

Neither does the Convention contain a clear statement of preemptive intent. Yet the Supreme Court found the absence of such a "plain statement of a pre-emptive intent" significant in deciding that the Hague Evidence Convention did not preempt other methods of discovery.[30]

Thus, nothing in the language of the Convention expressly reflects an intention to supplant all alternative methods of service. Rather, the Convention appears solely to govern the delivery of letters rogatory among the signatory States.

Veerkamp et al. also point to mandatory language found in the Convention and insists that similar language led the Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk* to conclude that the Hague Service Convention preempted other methods of service.[31] The significance of such mandatory language, however, depends on the context in which it is used. In the Convention, all of the mandatory language refers to what must be done with respect to letters rogatory; none of it remotely indicates that the procedures outlined in the Convention must be followed by the signatory nations for anything other than the processing of letters rogatory.[32]

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[30] *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 539, 107 S.Ct. 2542, 2553, 96 L.Ed.2d 461 (1987).

[31] *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S.Ct. 2104, 2108, 100 L.Ed.2d 722 (1988) (noting the mandatory language of art. 1).

[32] For example, the Convention indicates that it "shall apply to letters rogatory," Convention, art. 2, that execution of such letters by the receiving state "shall not imply ultimate recognition of the [sending authority's] jurisdiction," *Id.* art 9, and that "[l]etters rogatory shall be executed in accordance with

In contrast – as noted above – the Hague Service Convention applies "in all cases . . . where there is occasion to transmit judicial . . . document abroad."[33] It was precisely *this* mandatory language – not mandatory language in general, but mandatory language specifically addressing the *scope* of the Hague Service Convention – that the Supreme Court found so persuasive in *Schlunk*.[34]

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the laws . . . of the State of destination." *Id.* art. 10.

[33] Hague Service Convention, art. 1.

[34] 486 U.S. at 699, 108 S.Ct. at 2108. Interestingly enough the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter "Hague Evidence Convention"), March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, also contains mandatory language, yet the Supreme Court concluded that the Hague Evidence Convention does *not* preempt other methods of discovery previously employed by common-law courts. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). For example, the Hague Evidence Convention indicates that a contracting State *must* designate a Central Authority for receipt of letters of request. Hague Evidence Convention, art. 2. Here we find mandatory language, yet that language tells us nothing about whether the treaty is preemptive or not.

Indeed, it is common for treaty regimes to have mandatory language that tells signatories what they must do to execute particular provisions of the treaties. But again, such language tells us nothing about the scope of the treaties themselves. Analogously, mandatory language to the effect that "no one may smoke in the doctor's waiting room," indicates nothing about *when* we must wait in the waiting room. It gives us a rule for what we must do once there, but it does not tell us when we must be there. In this case, Veerkamp et al. are essentially arguing that mandatory language indicating what we must or must not do once in the waiting room (once the Convention is triggered) informs us when we must wait in that room (when the Convention is triggered). Such a contention is logically insupportable. In summary, the context in which mandatory language

Veerkamp et al. also argues that article 15 of the Convention demonstrates that the Convention was intended to preempt other methods of service. Article 15 provides that "[t]his convention shall [1] not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or [2] preclude the continuation of more favorable practices in this regard that may be followed by these States."[35] The first clause clearly permits contracting States to maintain alternative treaty-based procedures *for transmitting letters rogatory*. The second clause, however, is more difficult.

Veerkamp et al. interpret this second clause to permit contracting States to continue other more favorable service practices when those practices are agreed upon by all effected States. In other words, Veerkamp et al. construe this clause to *prohibit* continuation of *unilateral* service practices by contracting States. There is modest support for this construction in the State Department's comments on article 15 "authorizes the continuance of practices *between states concerning letters rogatory* which may be less restrictive than those prescribed by the Convention."[36]

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is used determines the relevance of such language to the inquiry at hand. Simply noting that a treaty contains mandatory language is unavailing. Because the mandatory language in the Hague Evidence Convention has nothing to do with the scope of the treaty, the Court evidently perceived that the language is not probative of whether the treaty preempts other methods of discovery. *See generally* 482 U.S. 522, 107 S.Ct. 2542.

[35] The Convention, art. 15.

[36] Treaty Doc. 98-27, p. viii (emphasis added).

There is, however, more to be said against this construction than in its favor.

The second clause of article 15 can reasonably be read as *affirmative permission* for signatory states to continue "more favorable practices" even if those practices are exercised *unilaterally.*[37] Article 15 simply states that the Convention does not "preclude continuation of more favorable practices by [contracting] States." This article indicates nothing about whether those practices must be assented to by other signatory nations. Neither do the State Department's comments necessarily support the position – held by Veerkamp et al. – that pre-existing State practices may be continued only if assented to by other States; for the word "between" may simply mean "among the contracting States," rather than "agreed upon by the contracting States" as Veerkamp et al. suggest.

Moreover, even if article 15 does not affirmatively permit continuance of unilateral state practices, there is still a palpable leap of logic in asserting that article 15's express authorization of certain mutually-accepted practices implicitly forbids others not so expressly authorized. Ironically, this same leap of logic is mirrored in the larger question at issue here, as Veerkamp et al. can just as easily argue – and do so argue – that the very existence

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[37] Interpreting article 15 to permit continuance of unilateral service of process practices by individual contracting States is not at all far fetched. Indeed, the Hague Evidence Convention has a provision that does exactly that – permit continuance of unilaterally-adopted procedures for discovery of evidence. *See* The Hague Evidence Convention art. 27; *Societe Nationale Industrielle Aerospatiale,* 482 U.S. at 537-38, 107 S.Ct. at 2552-53.

of the Convention on Letters Rogatory implies the proscription of other practices not permitted by the Convention. As discussed later, however, the Supreme Court does not accept this argument with respect to other conventions, and Veerkamp et al. provide [sic] us with no good reason to accept the argument here either: Their leap of logic remains just that – a leap.

Significantly, even if Veerkamp et al.'s assertion that article 15 does not authorize the continuation of unilaterally-exercised State practices were correct, it would not help them. As the language of article 15 appears to address only those treaties and State practices that pertain to *letters rogatory,* the article has nothing to say about other procedures for service of process. The expression "practices in this regard" found in article 15 can only mean "practices in regard to letters rogatory."

The State Department's comments on article 15 also support this construction, for they state expressly that article 15 permits "the continuance of practices between states *concerning letters rogatory.*"[38] As this case involves the question whether methods of service *other than* letters rogatory are preempted by the Convention, reliance on article 15 is misplaced: That article simply has nothing to say about any methods of serving process other than letters rogatory.

Kreimerman et al., for their part, point to article 17 of the Convention, which permits a "State of destination [to]

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[38] Treaty Doc. 98-27, viii (emphasis added).

refuse to execute a letter rogatory that is manifestly contrary to its public policy."[39] Interpreting a somewhat similar escape clause in the Hague Evidence Convention,[40] the Supreme Court proclaimed its unwillingness, "[i]n the absence of explicit textual support, . . . to accept the hypothesis that the common-law contracting states abjured recourse to all pre-existing discovery procedures at the same time that they accepted the possibility that a contracting party could unilaterally abrogate even the Convention's procedures."[41] The same could be said in this case: In the absence of explicit textual support we should be similarly chary before accepting that the United States abjured recourse to all other methods of service when other contracting States can unilaterally refuse to execute letters rogatory that are contrary to their public policies.

Thus, the text of the Convention strongly indicates, not that the Convention preempts other conceivable methods of service, but that it merely provides a mechanism for transmitting and delivering letters rogatory when and if parties elect to use that mechanism.

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[39] The Convention art. 17.

[40] Hague Evidence Convention, art. 23 (which allows a contracting party to withhold its consent to the convention's procedures for pretrial discovery).

[41] *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 537, 107 S.Ct. at 2552.

b. *Non-Textual or Extraneous Arguments*

Veerkamp et al. also advance several non-textual arguments in support of their assertion that the Convention preempts other methods of service. First, they point to President Reagan's Letter of Transmittal to the Senate, and the State Department's Letter of Submittal to the President, both of which opine that the Convention and Additional Protocol "establish a treaty-based system of jùdicial assistance *analogous* to that which exists" among the States that are parties to the Hague Service Convention.[42] But we do not see how this helps the defendants. "Analogous" means "similar in certain respects,"[43] or "bearing some resemblance or likeness that permits one to draw an analogy."[44] Inherent in these definitions is the connotation that analogous things are also "dissimilar" or "unlike" in certain respects, for if they were not they would be identical, or at least essentially identical, and not merely analogous. Thus, even taken literally, these statements merely beg the question "similar in what way." More likely, President Reagan and the State Department were simply referring to the most similar, already-existing treaty – the Hague Service Convention – without intending to make any legal judgments about the relative scopes of the two conventions.

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[42] Treaty Doc. 98-27, p. i, iii (emphasis added).

[43] *Oxford American Dictionary* 28 (Oxford Univ Press, Avon Books 1986).

[44] *Black's Law Dictionary* 84 (6th Ed. 1990).

Veerkamp et al. are also rather selective in drawing from these extrinsic sources. For example, they are careful not to refer us to the portion of the President's Letter of Transmittal in which he indicates, not that United States courts *must* resort to Convention procedures [mandatory], but that the courts "*will be able to* avail themselves of" such procedures (permissive).[45] Neither do they note President Reagan's opinion that "the purpose of the Convention is [merely] to *facilitate* service . . . of documents."[46] Similarly, Veerkamp et al. fail to call our attention to the State Department's assertion that "[t]he Convention, together with the Additional Protocol, establishes *a* mechanism [not *the* mechanism] for service of process" among the contracting States.[47] In view of the importance that the Supreme Court places on such permissive language,[48] Veerkamp et al.'s selective use of these extrinsic sources is understandable, albeit not altogether forthcoming. Taken as a whole, references to these extrinsic sources do not strengthen Veerkamp et al.'s position: Indeed, their net effect is to weaken it.

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[45] Treaty Doc. 98-27, p. i (emphasis added).

[46] *Id.* The Supreme Court attached considerable importance to precisely this sort of permissive language in holding that the Hague Evidence Convention did *not* preempt other pre-existing methods of discovery. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534, 107 S.Ct. 2542, 2550, 96 L.Ed.2d 461 (1987) (noting that the preamble to the convention stated that its purpose was to *facilitate* the transmission and execution of letters of request).

[47] *Id.* at iv (emphasis added).

[48] *See generally Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522, 107 S.Ct. 2542.

Veerkamp et al. also suggest that Kreimerman et al.'s construction of the Convention – which makes resort to the Convention procedures optional rather than mandatory – renders the Convention inefficacious: Contracting States could simply choose to disregard Convention procedures when they proved inconvenient. The Supreme Court, however, has rejected this argument in a variety of contexts. In *Societe Nationale Industrielle Aerospatiale*, for example, the Court concluded that it is enough that the Hague Evidence Convention "procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention."[49] Similarly, in *United States v. Alvarez-Machain*, the Supreme Court concluded that the 1978 Extradition Treaty between the United States and Mexico was not the exclusive means for the United States to gain custody over suspects residing in Mexico.[50] In so concluding, the Court rejected the argument – advanced by the dissent – that the purposes of the extradition treaty "would be utterly frustrated" if other means of gaining custody over foreign suspects were permitted.[51] The Supreme Court has thus clearly rejected the argument that a treaty must be construed to preempt alternative, nontreaty-based procedures if the treaty is not to be rendered nugatory.

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[49] *Id.* at 541, 107 S.Ct. at 2554.

[50] *United States v. Alvarez-Machain*, 504 U.S. ___, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).

[51] *Alvarez-Machain*, 504 U.S. at ___, 112 S.Ct. at 2198, 119 L.Ed.2d at 458.

In *Schlunk*, the Supreme Court explained why the argument is unconvincing,[52] pointing out – albeit in a different context – that "nothing . . . prevents compliance with the Convention even when the internal law of the forum does not so require."[53] The Court also observed that "[t]he Convention provides simple and certain means by which to serve process on a foreign national."[54]

These same observations apply perforce to this case. The Convention provides plaintiffs with a "safe harbor" – a dependable mechanism – but not necessarily the only lawful mechanism – by which they may effect service on defendants residing in another signatory nation. Plaintiffs who elect not to avail themselves of the Convention machinery assume the risk that other legal principles, like the principle of international comity, might hinder their establishment of jurisdiction over the defendants. Finally, such plaintiffs may also discover that their failure to employ the Convention's safe harbor procedures makes enforcement of their judgments abroad more difficult or even impossible.[55]

When we thus consider all the arguments advanced by the parties – both textual and non-textual – we conclude that the Convention does not preempt other methods of service. This conclusion does not, however, guarantee the availability or efficacy of other methods of

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[52] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706, 108 S.Ct. 2104, 2111, 100 L.Ed.2d 722 (1988).

[53] *Id.*, 486 U.S. at 706, 108 S.Ct. at 2111.

[54] *Id.*

[55] *Id.*

service, and we do not today decide which other methods of service – if any – would be supportable or efficacious under applicable domestic and international law.

3. *The Texas Long-Arm Statute*

Veerkamp et al. urge that considerations of comity require that we respect the traditional civil law requirement – apparently practiced in Mexico – that legal documents be served by a government official or through other official channels. Veerkamp et al. would have us affirm on other grounds the district court's decision to quash service: specifically, by declaring that such service violates principles of comity. Ignoring for a moment the failure by Veerkamp et al. to introduce any evidence concerning the laws of Mexico or any precedents explaining how principles of comity might apply here, this argument misconstrues the core issue of this case.

Although the parties apparently agree that Kreimerman et al. properly employed the machinery of the Texas Long-Arm Statute, they do not address – in their submissions to us or to the district court – whether service of process under the Texas Long-Arm Statute on defendants residing in Mexico contravenes notions of comity, the procedural requirements of Fed.R.Civ.P. 4, or any other applicable domestic or international laws.[56] Neither did

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[56] The content of Federal Rule of Civil Procedure 4(f), formerly largely contained in Fed.R.Civ.P. 4(i), seems especially relevant to this analysis. But again, the parties did not discuss whether Kreimerman's attempt to serve Veerkamp under the Texas Long-Arm Statute comports with Rule 4(f).

the district court reach such issues: Its inquiry ended when it held – incorrectly, we conclude – that the Convention preempted all other methods of service on defendants residing in another signatory nation. Whether Kreimerman et al.'s attempt to serve process under the Texas Long-Arm Statute contravened any other law besides the Convention is thus not before us. Such considerations are for the district court on remand.[57]

B. *Other Issues*

Kreimerman et al. also raise several other issues, none of which warrants extensive treatment at this juncture.

1. *Removal to the Wrong Division*

A defendant who wants to remove a civil action from a state court to a federal district court must "file in the district court of the United States for the district and

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Rule 4(f), rather than the former Rule 4(i), is the provision that the district court must analyze on remand because the 1993 amendments to the federal Rules of Civil Procedure took effect on December 1, 1993, and govern "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, *all proceedings in civil cases then pending*." Order of the Supreme Court of the United States Adopting and Amending Rules, April 22, 1993; *see also Burt v. Ware*, 14 F.3d 256, 258 (5th Cir. 1994) (indicating that amendments to the Federal Rules of Appellate Procedure should be given retroactive application to the maximum extent possible).

[57] We leave it to the district court's discretion whether to hold additional hearings on these questions.

division within which such action is pending a notice of removal. . . . "[58] In this case, the parties agree that the action should have been removed, not to the Houston Division, but to the McAllen Division of the Southern District of Texas. Relying on this error, Kreimerman et al. moved the district court to remand the case to state court, or, alternatively, to transfer the case to the McAllen Division. The court, however, denied the motion. Kreimerman et al. now insist that the court's denial constituted reversible error.

Citing *King v. Gulf Oil Co.*,[59] Veerkamp et al. suggest that we simply dismiss this defect in removal by invoking harmless error.[60] As removal statutes are strictly construed against removal,[61] though, we decline to take such a dismissive approach. Some courts have held that removal of a case to the wrong division of the right district nevertheless creates a jurisdictional defect, leaving the district court with no power to adjudicate the case and no choice but to remand.[62] Other courts have held that removal to the wrong division is procedural, not jurisdictional.[63] We agree with the later perspective.

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[58] 28 U.S.C. § 1446(a).

[59] 581 F.2d 1184, 1187 (5th Cir. 1978) (reversal for failure to follow Fed.R.Civ.Pro. is warranted only if prejudice is demonstrated.

[60] Veerkamp et al. refer, of course, to 28 U.S.C. § 2111.

[61] *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986); *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979).

[62] *See e.g., Scarmardo v. Mooring*, 89 F.Supp. 936, 937 (S.D.Tex. 1950).

[63] *Cook v. Shell Chemical Co.*, 730 F.Supp. 1381, 1382 (M.D.La. 1990).

Although Veerkamp et al. removed this case to the wrong division, there is not doubt that the district court had subject matter jurisdiction under 28 U.S.C. § 1332, given the parties' diversity of citizenship.[64] The existence of such jurisdiction makes this case much more akin to an improper venue situation than to one in which there is an actual jurisdictional defect.[65] The district court thus should have transferred the case to the McAllen division under the authority of 28 U.S.C. § 1406(a), which – in the interest of justice – allows a case to be transferred "to any district or division in which it could have been brought."[66] As we are remanding the case to the district court anyway, we need not decide whether the court's refusal to transfer the case constituted reversible error: We simply remand the case to the Houston Division with directions to transfer the case to the McAllen Division under 28 U.S.C. § 1406(a).

2. *Motion to Extend*

Kreimerman et al. also complain that the magistrate judge erred in rejecting their third motion to extend the time within which to accomplish service of process. A district court, however, has broad discretion to dismiss an

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[64] *Id.; accord Mortensen v. Wheel Horse Prods., Inc.*, 772 F.Supp. 85, 89 (N.D.N.Y. 1991).

[65] *Mortensen*, 772 F.Supp. at 89; *Cook*, 730 F.Supp. at 1382.

[66] 28 U.S.C. § 1406(a); *Mortensen*, 772 F.Supp. at 89; *Cook*, 730 F.Supp. at 1382.

action for ineffective service of process,[67] so we review such a decision only for abuse of discretion.[68] Additionally, when the time to effect service has expired, the party attempting service has the burden of demonstrating "good cause" for failure to serve the opposing party.[69]

In this case, Kreimerman et al. did not move to extend service for the third time until more than a month after the expiration of the twice previously extended deadline for effecting service. Therefore, they had the burden of demonstrating that there was good cause for their failure to effect service. Attempting to satisfy that burden, Kreimerman et al. insist that their failure was through no fault of their own. We acknowledge that available evidence suggests that service of process takes considerably longer to accomplish in Mexico than it does in the United States.[70] We also realize that the Mexican attorney who was "helping" Kreimerman et al. serve process on the defendants apparently misrepresented even to Kreimerman that service had been accomplished.

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[67] *George v. United States Dep't of Labor*, 788 F.2d 1115, 1116 (5th Cir. 1986).

[68] *System Signs Supplies v. United States Dep't of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990).

[69] *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1305 (5th Cir. 1985).

[70] If it is true that it takes considerably longer to effect service of process in Mexico than in the United States, then this is yet another reason to hold that the Convention does not foreclose other methods of service. If the machinery provided by the Convention does not work very well, we should be loathe to condemn United States residents to use such an ineffective apparatus.

Unfortunately for Kreimerman et al., however, action or inaction that fall into the categories of inadvertence, mistake, or ignorance of counsel do not constitute excusable neglect.[71]

Kreimerman et al. selected and reposed their trust in the Mexican counsel, who in turn selected and worked with the other lawyer in Mexico City, who ultimately proved to be unreliable or dishonest, or both. That is at least vicariously Kreimerman et al.'s fault. Moreover, when Kreimerman et al. made their third motion to extend the time for service, they had already been given sixteen (16) months in which to serve the defendants, and the magistrate judge found that there was no reason to believe that service would have been effected in the near future. The translation of legal documents into Spanish, for example, took six months, and Kreimerman et al.'s Mexican counsel suggested that those translations were still inadequate. Even if we were to assume that the misrepresentations by the Mexican counsel constituted good cause for failing to effect service, we would conclude that Kreimerman et al. did not show good cause for failure to take any action during the eight months preceding those misrepresentations. Neither did Kreimerman et al. explain why the whole process was not further along after nearly two years. Under these facts, we cannot say that the district court abused its discretion.

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[71] *McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993).

3. *Adoption of Magistrate Judge's Recommendations*

Kreimerman et al. also suggest that the district court did not make a *de novo* review of the magistrate judge's Memorandum and Recommendations. They complain that the district court erred in adopting the magistrate judge's recommendations before they had filed their written objections. Kreimerman et al. assert, in essence, that because the district court did not wait for them to file their objections, and because the court did not clarify the magistrate judge's ruling with respect to the tolling of the applicable statute of limitations (and other rulings), we cannot be certain that the district court made a proper *de novo* review.

We grant that a district court must make a *de novo* review whenever a party objects to the magistrate judge's recommending dismissal.[72] In this instance, however, Kreimerman et al. do little more than speculate that the district court *may* not have made a *de novo* review of the instant case. They advance neither evidence nor specific factual allegations in support of their prayer for reversal. Under these sparse circumstances, we are most reluctant to find that the district court failed to engage in a proper review.[73]

Neither are we troubled by the district court's adoption of the magistrate judge's recommendations prior to the court's receipt of Kreimerman et al.'s timely-filed

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[72] *Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.); *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989).

[73] *Longmire*, 921 F.2d at 623.

written objections. Kreimerman et al. cite no cases which hold that a district court's failure to wait until objections are filed before adopting a magistrate judge's recommendations constitutes reversible error.[74] Moreover, even if the district court had erred in its attempt to follow the Federal Rules of Civil Procedure, we would not be forced to reverse in the absence of prejudice.[75] Additionally, Kreimerman et al.'s two motions for reconsideration gave the district court opportunity to consider – yet again – their objections. We discern no reason to believe that the district court did not do its job properly.

III

CONCLUSION

After analyzing all the arguments advanced by each side, we conclude that the Convention does not preempt every other conceivable method of serving process on defendants residing in other signatory states. This conclusion does not necessarily imply the existence and availability of other methods of service that would be supportable and effective under domestic and international law. We simply hold that the Inter-American Convention on Letters Rogatory does not foreclose other

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[74] Kreimerman does cite *Nalty v. Nalty Tree Farm*, 654 F.Supp. 1315 (D.Ala. 1987), but that case merely established the method for computing the time period for filing objections: it says nothing about whether a district court must wait for those objections to be filed before adopting a magistrate's recommendations.

[75] *See, e.g., King v. Gulf Oil Co.*, 581 F.2d 1184, 1187 (5th Cir. 1978) (court failed to hold hearing on class certification).

methods of service among parties residing in different signatory nations, if otherwise proper and efficacious. We therefore remand the case to the district court with instructions to consider whether the only other method of service of process attempted by the plaintiffs – service under the Texas Long-Arm Statute – comports with principles of comity. Fed.R.Civ.P. 4 (especially 4(f)), and any other applicable legal principles of domestic or international law. Because the case was originally remanded to the wrong division of the United States District Court for the Southern District of Texas, however, we remand the case to the Houston Division with directions to transfer it to the McAllen Division, pursuant to 28 U.S.C. § 1406(a). The McAllen Division will then determine whether Kreimerman et al.'s attempt to serve the defendants under the Texas Long-Arm Statute contravened any applicable laws or legal principles.

In connection with our instructions to the McAllen Division of the United States District Court for the Southern District of Texas, we emphasize that nothing in this opinion should be construed as authorizing Kreimerman et al. to institute any new or additional efforts to serve the defendants: The district court need only determine whether Kreimerman et al.'s previous efforts to serve process under the Texas Long-Arm Statute were consistent with applicable legal principles – international and domestic.

Therefore, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED to the Houston Division of the United States District Court for the Southern District of Texas, with instructions to transfer the case under 28 U.S.C. § 1406(a) to the

McAllen Division for further proceedings consistent with this opinion.

APPENDIX B

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY D/B/A HERMES MUSIC,	§	
Plaintiffs,	§	CIVIL ACTION
	§	NO. H-91-3770
VS.	§	
CASA VEERKAMP, S.A. DE C. V. WALTHER VEERKAMP, ELECTRONICA SOLIDA MEXICANA, S.A. AND JORGE R. MENDEZ,	§	
Defendants.	§	

ORDER

(Filed Feb. 6, 1992)

The defendant's motion to dismiss (instrument #4) is DENIED without prejudice. However, the service of process is insufficient and, it is QUASHED.

The plaintiff's motion to remand (instrument #7) is DENIED. The plaintiff's claims of a defective removal based on the fact that the case was removed to a Division of the District outside the Division where the plaintiff

initiated the case is without merit and does not defeat removal.

The plaintiff's motion to transfer is DENIED without prejudice. No basis is expressed for the transfer of this case that sounds in federal jurisprudence.

It is so ORDERED.

Signed this 5th day of February, 1992.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY d/b/a HERMES MUSIC	§	
Plaintiffs	§	CIVIL ACTION NO. H-91-3770
vs.	§	(Filed March 29, 1993)
CASA VEERKAMP, S.A. DE C.V. WALTHER VEERKAMP, ELECTRONICA SOLIDA MEXICANA, S.A. AND JORGE R. MENDEZ	§	
Defendants	§	

MEMORANDUM AND RECOMMENDATIONS

This is an action brought by Alberto Kreimerman, Hermes International, Inc. and Hermes Trading Company d/b/a Hermes Music ("Kreimerman, et al.") against Casa Veerkamp, S.A. De C.V., Walther Veerkamp, Electronica Solida Mexicana, S.A. and Jorge R. Mendez ("Veerkamp, et al.") alleging libel, civil conspiracy, and slander.

Procedural Background

This action was originally filed on November 4, 1991, in the 139th Judicial District Court of Hidalgo County, Texas, Cause Number C481991C, and removed to this court as a diversity action on December 23, 1991.

Factual Background

Alberto Kreimerman ("Kreimerman") is a resident of Hidalgo County, Texas. Hermes International, Inc. ("Hermes International") and Hermes Trading Company, d/b/a Hermes Music Company ("Hermes Music") are Texas corporations whose principal places of business are in Hidalgo County, Texas. Walther Veerkamp ("Veerkamp") and Jorge R. Mendez ("Mendez") are residents of the United Mexican States. Casa Veerkamp, S.A. De C.V. ("Veerkamp, S.A.") and Electronica Solida Mexicana ("ESM"), are Mexican corporations whose principal places of business are located in the United Mexican States.

Plaintiffs Kreimerman, et al. and Defendants Veerkamp, et al. are competitors in the business of selling amateur and professional music products, including instruments, amplifiers, speakers, speaker systems, microphones, and other sound system equipment.

A. Libel

Kreimerman, as the sole owner and stockholder of Hermes Music and Hermes International, alleges that on or about October 31, 1990, ESM, acting by and through its general manager, Mendez, sent written correspondence to two (2) known music products companies, the JBL Company and the Peavey Company, and to several unknown music products companies. The correspondence contained photocopies of articles published on or about October 22 and October 28, 1990, by the *Seminario Quehaces Politico En Mexico*, a political magazine circulated in

the United Mexican States. Kreimerman, et al. allege that the articles were defamatory in that they falsely accused Kreimerman and his companies of illegal activities which included drug trafficking and money laundering. In addition, Kreimerman, et al. allege that the correspondence sent by ESM and Mendez contained written statements which specifically referred to the accusations stated in the *Seminario Quehaces Politico En Mexico* articles. It is the position of Kreimerman, et al. that the correspondence was intended to interrupt and diminish the business relationships of Hermes and Hermes International.

Kreimerman, et al. also allege that on or about November 15, 1990, Veerkamp, S.A., acting by and through Veerkamp, sent photocopies of the aforementioned *Seminario Quehaces Politico En Mexico* articles and a summary translation of the articles into the English language to the JBL and Zildjian music product companies, and to other unknown music products companies. Additionally, Veerkamp, et al. allege that there were written statements which referred to the statements contained in the articles.

B. Slander

Next, Kreimerman, et al. allege that Veerkamp, acting alone and on behalf of Veerkamp, S.A. and Mendez, acting alone and on behalf of ESM, had conversations with officers, managers, representatives, and salesmen of several music products manufacturing companies located within and outside of the United States. The conversations allegedly referred to Kreimerman and his companies' involvement in drug smuggling activities, "gun

running," and money laundering; and within the conversations Veerkamp, et al. allegedly stated that Kreimerman's businesses would soon fail as a result of a forthcoming criminal prosecution.

C. Civil Conspiracy

In their final claim, Kreimerman, et al. allege that the actions of ESM, Mendez, Veerkamp, S.A., and Veerkamp were undertaken pursuant to a common plan designed to injure the reputation and business relationships of Kreimerman, Hermes Music, and Hermes International.

Plaintiffs' Failure to Effect Service of Process

Defendants Veerkamp, et al. have filed the instant motion to dismiss and for sanctions seeking to dismiss this action due to Plaintiffs Kreimerman, et al.'s failure to serve process on any of the Defendants more than one (1) year after this action was originally filed in Hidalgo County, Texas. In response to the motion to dismiss, Kreimerman, et al. argue that their failure to effect service of process is not the result of willful neglect and that in the absence of such neglect, they are entitled to maintain this action. The Court disagrees.

Kreimerman, et al.'s efforts to serve process on Veerkamp, et al. began in November, 1991, while this action was pending before the 139th Judicial District Court of Hidalgo County, Texas, when Kreimerman, et al. attempted to provide Veerkamp, et al. with notice of this action by serving the Texas Secretary of State, pursuant to Tex. Civ. Proc. & Rem. Code Section 17.041, *et seq.* ("The

Texas Long-Arm Statute"). However, this attempted service violated the Inter-American Convention on Letters Rogatory, a multi-national treaty designed to facilitate service of judicial documents in foreign countries which are signatories to the treaty, and this Court, on February 5, 1992, quashed Veerkamp, et al. attempted service of process.

To effect service of process on a foreign individual or corporation, a party may request that the foreign government serve the foreign party, pursuant to Rule 4 (i)(1), Fed. R. Civ. Proc., which reads in part:

> [w]hen the federal or state law. . . . authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be affected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice.

In accordance with Rule 4, the Court on June 18, 1992 granted Kreimerman, et al.'s motion for entry of Letters Rogatory for service of process. Despite the Court's grant of Veerkamp, et al.'s motion for Letters Rogatory and two (2) motions to extend time to serve process upon Kreimerman, et al., to date, Kreimerman et al. have yet to complete service of process upon Veerkamp, et al.

In support of their first motion to extend time to serve Veerkamp, et al., Kreimerman, et al. stated that additional time was necessary to complete the Letters Rogatory process and that service of process could be

completed by October 31, 1992. In support of their second motion to extend time to serve Defendants, Kreimerman, et al. stated additional time was necessary in that they had retained counsel in the United Mexican States, Sergio Mauricio Cisneros ("Cisneros"), who had advised Kreimerman, et al. that because there were only three (3) bailiffs in Mexico City who were authorized to serve process for foreign judicial proceedings, and because of the volume of summonses and processes to be served, that service of process could not be completed prior to December 15, 1992. With yet an additional justification, on March 11, 1993, Kreimerman, et al. requested a third extension of time to serve Kreimerman, et al. stating that it has become necessary to retain new counsel in Mexico City due to misrepresentations made by former counsel who had been hired to complete the Letters Rogatory process and effect service of process.

More specifically, Cisneros, an attorney licensed to practice law in the United Mexican States, was hired, in April 1992, by counsel for Kreimerman, et al., Jan R. Thurman ("Thurman"), an attorney licensed to practice law in Texas, but not in the United Mexican States, for the sole purpose of effecting service of process on Veerkamp, et al. in accordance with the laws of the United Mexican States. Thurman selected Cisneros based upon Cisneros' reputation as an excellent lawyer and because of the excellent reputation of the law firm with which Cisneros was employed, Bryan, Gonzalez Vargas and Gonzalez Baz, located in Ciudad Juarez in the United Mexican States, bordering El Paso, Texas. When Cisneros was hired by Thurman, Cisneros' principal office was located in Ciudad Juarez, approximately one thousand miles

(1,000) outside of Mexico City, but his firm had offices throughout the United Mexican States including Mexico City where Kreimerman, et al. were located. Because service of process was to be completed in Mexico City, Cisneros chose to hire an associate of his, Ocatavio Alvarez (Alvarez"), an attorney licensed in the United Mexican States, who lived in Mexico City.

To initiate the proper service on Veerkamp, et al., this Court, in June 1992, issued the appropriate Letters Rogatory to Thurman who then mailed the Letters Rogatory to Cisneros. Thereafter, on July 15, 1992, Thurman received a letter from Cisneros indicating that the Letters Rogatory had been filed with the Federal District of the Republic of Mexico.

On October 1 and October 12, 1992, Thurman sent letters to Cisneros inquiring as to the status of the processing of the Letters Rogatory. On October 15, 1992, Cisneros responded by letter stating that the "legalization procedure" had taken a long time, and that because only three (3) bailiffs had been available in Mexico City to serve foreign processes, additional time should be requested of this Court to effect service of process.

On October 28, 1992, via telephone, Cisneros advised Thurman that service of process had been scheduled to occur during the week of November 23, 1992, and should be completed no later than December 15, 1992. Approximately one (1) month later, on November 30, 1992, Cisneros, again via telephone, contacted Thurman to advise him that service of process had been effected during the week of November 23, 1992, but that he, Cisneros, had

not yet received the original Letters Rogatory from the Federal District of the United Mexican States.

On December 11, 1992, and on January 13, 1993, Thurman urged Cisneros to return the original Letters Rogatory. On January 20, 1993, Cisneros again advised Thurman that service of process had been completed and that he would soon be visiting Mexico City and during such visit he would secure the original Letters Rogatory. On February 4, 1993, Cisneros advised Thurman that an additional two (2) or three (3) weeks would be necessary to allow Mexican officials to execute and approve the Letters Rogatory.

On February 9, 1993, counsel for Veerkamp, et al., James A. Porter ("Porter"), sent a letter to Thurman and to the Court stating that neither Veerkamp nor Veerkamp, S.A. had been served with process. To determine the veracity of Porter's statement that service had not been effected, Thurman contacted Cisneros on February 16, 1993, and the following day, February 17, 1993, Cisneros advised Thurman that service of process had not been effected by Cisneros' associate in Mexico City, Alvarez.

Applicable Law

It is axiomatic that service upon domestic individuals or corporations must be completed within 120 days after filing of the complaint. See Rule 4(j), Fed. R. Civ. Proc.; *Carimi v. Royal Caribbean Cruise Line, Inc.*, 959 F.2d 1344, 23 Fed. R. Serv. 3d 16 (5th Cir. 1992); *Systems Signs Supplies v. U.S. Department of Justice, D.C.*, 903 F.2d 1011, 16 Fed. R. Serv. 3d 1207 (5th Cir. 1990); *McDonald v. U.S.*, 898 F.2d 466, 16 Fed. R. Serv. 3d 247 (5th Cir. 1990). Rule 4(j),

Fed. R. Civ. Proc. permits the Court to extend the time limit for service of process beyond 120 days upon a showing of good cause. However, Rule 4(j), Fed. R. Civ. Proc., specifically states that subdivision (j) shall not be applicable to service of process in a foreign country, therefore excepting service of process in a foreign country from the 120 day time limit and removing the requirement that good cause be shown to permit an extension of the time limit for service. *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991); *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2nd Cir. 1985). It is the opinion of this Court that because of the unique circumstances that arise when effecting service in a foreign country, that Congress in drafting the Rule 4(j), Fed. R. Civ. Proc., intended that the Court have wide discretion in enlarging the time limit for service of process in a foreign country. Guided by fairness to the parties and the restrictions imposed by Rule 1, Fed. R. Civ. Proc., that all civil suits be resolved in a speedy and inexpensive manner, this Court has granted Kreimerman, et al. two (2) motions to extend time to permit service of process which have afforded Kreimerman, et al. more than sixteen (16) months to effect service of process.

In recommending that this action be dismissed without prejudice, the Court finds it significant that there is no evidence that Veerkamp has been attempting to evade service of process. In fact, it is undisputed that Veerkamp, S.A., a family-owned company, has been located in Mexico City for fifty (50) years or more. Despite this fact however, and despite the time extensions granted by the Court, Kreimerman, et al. have been unable to effect service of process on Veerkamp, et al. Furthermore, the Court has considered whether service of process would

occur in the near future, and has concluded that there is no proof that should the Court grant yet another thirty (30) day extension to the Plaintiffs, that service of process would definitely be effected within the next thirty (30) days.

RECOMMENDATIONS

Thus, for the foregoing reasons, it is

RECOMMENDED that the Casa Veerkamp, S.A. De C.V., Walther Veerkamp, Electronica Solida Mexicana, S.A. and Jorge R. Mendez's Motion to Dismiss and for Sanctions (#25) be granted and that this action be dismissed without any prejudice to its refiling.

The Clerk will file this instrument and transmit a copy to each party or counsel. Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days after the date of filing shall bar an aggrieved party from attacking the factual findings on appeal.

ENTERED at Houston, Texas, this the 26th day of March, 1993.

/s/ Calvin Botley
Calvin Botley
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY d/b/a HERMES MUSIC	§	
Plaintiffs	§	CIVIL ACTION NO. H-91-3770
vs.	§	
CASA VEERKAMP, S.A. DE C.V. WALTHER VEERKAMP, ELECTRONICA SOLIDA MEXICANA, S.A. AND JORGE R. MENDEZ	§	
Defendants	§	

ORDER

(Filed March 29, 1993)

Pending before the Court is Alberto Kreimerman, Hermes International, Inc., and Hermes Trading Company d/b/a Hermes Music's Motion to Extend Time to Service Process (#26). After reviewing the pleadings and the applicable law, and for the reasons set forth in this Court's Memorandum and Recommendations entered this day, it is

ORDERED that Alberto Kreimerman, Hermes International, Inc., and Hermes Trading Company d/b/a Hermes Music's Motion to Extend Time to Serve Process (#26) is denied.

The Clerk shall enter this Order and provide all parties with a true copy.

ENTERED at Houston, Texas, this the 26th day of March, 1993.

/s/ Calvin Botley
Calvin Botley
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, ET AL	§	
	§	
Plaintiff	§	CIVIL ACTION
	§	NO. H-91-3770
vs.	§	
CASA VEERKAMP, S.A. DE C V. ET AL	§	
	§	
Defendants	§	

ORDER

(Filed April 9, 1993)

For the reasons set forth in the United States Magistrate Judge's Memorandum and Recommendations, signed on March 26, 1993, it is

ORDERED that said Recommendations be and the same are hereby adopted as the Court's Memorandum and Order. It is therefore

ORDERED, ADJUDGED and DECREED that Defendants' Motions to Dismiss and for Sanctions are GRANTED, and that this action is dismissed without prejudice.

The Clerk shall enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this the 9th day of April, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

(Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY D/B/A HERMES MUSIC,	§	
Plaintiffs,	§	CIVIL ACTION
VS.	§	NO. H-91-3770
CASA VEERKAMP, S.A. DE C. V. WALTHER VEERKAMP, ELECTRONICA SOLIDA MEXICANA, S.A. AND JORGE R. MENDEZ,	§	
Defendants.	§	

ORDER

(Filed April 26, 1993)

On this day, the motion for reconsideration filed by the plaintiffs, Alberto Kreimerman, Hermes International, Inc. and Hermes Trading Company d/b/a Hermes Music was heard. The Court finds that the motion should be Denied.

It is therefore ORDERED that the motion for reconsideration is DENIED.

Signed this 23rd day of April, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. AND HERMES TRADING COMPANY d/b/a HERMES MUSIC	§	
Plaintiffs	§	CIVIL ACTION NO. H-91-3770
vs.	§	
CASA VEERKAMP, S.A. DE C. V. WALTHER VEERKAMP, ELECTRONICA SOLIDA MEXICANA, S.A. AND JORGE R. MENDEZ	§	
Defendants	§	

ORDER

(Filed May 26, 1993)

Pending before the Court is Plaintiffs' Motion to Reinstate Plaintiffs' Motion for Reconsideration (#39).

In their motion Plaintiffs' urge the Court to reconsider its order denying Plaintiffs' Motion for Reconsideration (#36) arguing that the Court should reinstate the motion for reconsideration to allow additional argument. After careful review of the motion to reinstate and the applicable law, it is

ORDERED that Plaintiffs' Motion to Reinstate Plaintiffs' Motion for Reconsideration (#39) is denied.

The Clerk shall enter this Order and provide a copy to all parties.

ENTERED at Houston, Texas, this the 25th day of May, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

APPENDIX C

INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:

I. USE OF TERMS

Article 1

For the purposes of this Convention the terms "exhortos" and "cartas rogatorias" are synonymous in the Spanish text. The terms "letters rogatory", "commissions rogatoires", and "cartas rogatórias" used in the English, French and Portuguese texts, respectively, cover both "exhortos" and "cartas rogatorias".

II. SCOPE OF THE CONVENTION

Article 2

This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial of other adjudicatory authority of one of the States Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad;

b. The taking of evidence and the obtaining of information abroad, unless a reservation is made in this respect.

Article 3

This Convention shall not apply to letters rogatory relating to procedural acts other than those specified in the preceding article; and in particular it shall not apply to acts involving measures of compulsion.

III. TRANSMISSION OF LETTERS ROGATORY

Article 4

Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be.

Each State Party shall inform the General Secretariat of the Organization of American States of the Central Authority competent to receive and distribute letters rogatory.

IV. REQUIREMENTS FOR EXECUTION

Article 5

Letters rogatory shall be executed in the States Parties provided they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to the duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination.

Article 6

Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required.

Article 7

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

Article 8

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the judicial or other adjudicatory authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

c. Where appropriate, information on the existence and address of the court-appointed

defense counsel or of competent legal-aid societies in the State of origin.

Article 9

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the judicial or other adjudicatory authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it.

V. EXECUTION

Article 10

Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.

At the request of the judicial or other adjudicatory authority issuing the letter rogatory, the authority of the State of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested, provided this procedure or the observance of those formalities is not contrary to the law of the State of destination.

Article 11

The authority of the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory.

Should such authority find that it lacks jurisdiction to execute the letter rogatory, it shall *ex officio* forward the

documents and antecedents of the case to the authority of the State which has jurisdiction.

Article 12

The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties.

The State of destination may, in its discretion, execute a letter rogatory that does not indicate the person to be held responsible for costs and other expenses when incurred. The identity of the person empowered to represent the applicant for legal purposes may be indicated in the letter rogatory or in the documents relating to its execution.

The effects of a declaration *in forma pauperis* shall be regulated by the law of the State of destination.

Article 13

Consular or diplomatic agents of the States Parties to this Convention may perform the acts referred to in Article 2 in the State in which they are accredited, provided the performance of such acts is not contrary to the laws of that State. In so doing, they shall not perform any acts involving measures of compulsion.

VI. GENERAL PROVISIONS

Article 14

States Parties belonging to economic integration systems may agree directly between themselves upon special

methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

Article 15

This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States.

Article 16

The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and "contentious-administrative" cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.

Article 17

The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public").

Article 18

The States Parties shall inform the General Secretariat of the Organization of American States of the requirements stipulated in their laws for the legalization and the translation of letters rogatory.

VII. FINAL PROVISIONS

Article 19

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 20

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 21

This Convention shall remain open for accession by any other State. The instrument of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 22

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 23

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 24

Thus Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the information mentioned in the second paragraph of Article 4 and in Article 18 and the declarations referred to in Articles 16 and 23 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

The Governments of the Member States of the Organization of American States, desirous of strengthening and facilitating international cooperation in judicial procedures as provided for in the Inter-American Convention on Letters Rogatory, done in Panama on January 30, 1975, have agreed as follows:

I. SCOPE OF PROTOCOL

Article 1

This Protocol shall apply only to those procedural acts set forth in Article 2 (a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as "the Convention". For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination.

II. CENTRAL AUTHORITY

Article 2

Each State Party shall designate a central authority that shall perform the functions assigned to it in the Convention and in this Protocol. At the time of deposit of

their instruments of ratification or accession to this Protocol, the States Parties shall communicate the designations to the General Secretariat of the Organization of American States, which shall distribute to the States Parties to the Convention a list containing the designations received. The Central Authority designated by a State Party in accordance with Article 4 of the Convention may be changed at any time. The State Party shall inform the above-mentioned Secretariat of such change as promptly as possible.

III. PREPARATION OF LETTERS ROGATORY

Article 3

Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.

Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.

Letters rogatory shall be accompanied by the following:

a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination;

b. Untranslated copy of the documents attached to the complaint or pleading;

c. Untranslated copy of any rulings ordering issuance of the letter rogatory;

d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and

e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory.

The copies shall be regarded as authenticated for the purposes of Article 8 (a) of the Convention if they bear the seal of the judicial or other adjudicatory authority that issued the letter rogatory.

A copy of the letter rogatory together with Form G and the copies referred to in items a, b, and c, of this Article shall be delivered to the person notified or to the authority to which the request is addressed. One of the copies of the letter rogatory and the documents attached to it shall remain in the possession of the State of destination; the untranslated original, the certificate of execution and the documents attached to them shall be returned to the Central Authority of the State of origin through appropriate channels.

If a State Party has more than one official language, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages shall be considered official for the purposes of the Convention and of this Protocol. If a State Party comprises territorial

units that have different official languages, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages in each territorial unit shall be considered official for the purposes of the Convention and of this Protocol. The General Secretariat of the Organization of American States shall distribute to the States Parties to this Protocol the information contained in such declarations.

IV. TRANSMISSION AND PROCESSING OF LETTERS ROGATORY

Article 4

Upon receipt of a letter rogatory from the Central Authority in another State Party, the Central Authority in the State of destination shall transmit the letter rogatory to the appropriate judicial or administrative authority for processing in accordance with the applicable local law.

Upon execution of the letter rogatory, the judicial or administrative authority or authorities that processed it shall attest to the execution thereof in the manner prescribed in their local law, and shall transmit it with the relevant documents to the Central Authority. The Central Authority of the State Party of destination shall certify execution of the letter rogatory to the Central Authority of the State Party of origin on a form conforming to Form C of the Annex, which shall not require legalization. In addition, the Central Authority of the State of destination shall return the letter rogatory and attached documents to the Central Authority of the State of origin for delivery to the judicial or other adjudicatory authority that issued it.

V. COSTS AND EXPENSES

Article 5

The processing of letters rogatory by the Central Authority of the State Party of destination and its judicial or administrative authorities shall be free of charge. However, this State Party may seek payment by parties requesting execution of letters rogatory for those services which, in accordance with its local law, are required to be paid for directly by those parties.

The party requesting the execution of a letter rogatory shall, at its election, either select and indicate in the letter rogatory the person who is responsible in the State of destination for the cost of such services or, alternatively, shall attach to the letter rogatory a check for the fixed amount that is specified in Article 6 of this Protocol for its processing by the State of destination and will cover the cost of such services or a document proving that such amount has been transferred by some other means to the Central Authority of the State of destination.

The fact that the cost of such services ultimately exceeds the fixed amount shall not delay or prevent the processing or execution of the letter rogatory by the Central Authority or the judicial or administrative authorities of the State of destination. Should the cost exceed that amount, the Central Authority of the State of destination may, when returning the executed letter rogatory, seek payment of the outstanding amount due from the party requesting execution of the letter rogatory.

Article 6

At the time of deposit of its instrument of ratification or accession to this Protocol with the General Secretariat of the Organization of American States, each State Party shall attach a schedule of the services and the costs and other expenses that, in accordance with its local law, shall be paid directly by the party requesting execution of the letter rogatory. In addition, each State Party shall specify in the above-mentioned schedule the single amount which it considers will reasonably cover the cost of such services, regardless of the number or nature thereof. This amount shall be paid when the person requesting execution of the letter rogatory has not designated a person responsible for the payment of such services in the State of destination but has decided to pay for them directly in the manner provided for in Article 5 of this Protocol.

The General Secretariat of the Organization of American States shall distribute the information received to the States Parties to this Protocol. A State Party may at any time notify the General Secretariat of the Organization of American States of changes in the above-mentioned schedules, which shall be communicated by the General Secretariat to the other States Parties to this Protocol.

Article 7

States Parties may declare in the schedules mentioned in the foregoing articles that, provided there is reciprocity, they will not charge parties requesting execution of letters rogatory for the services necessary for executing them or will accept in complete satisfaction of

the cost of such services either the single fixed amount specified in Article 6 or another specified amount.

Article 8

This Protocol shall be open for signature and subject to ratification or accession by those Member States of the Organization of American States that have signed, ratified, or acceded to the Inter-American Convention on Letters Rogatory signed in Panama on January 30, 1975.

This Protocol shall remain open for accession by any other State that accedes or has acceded to the inter-American Convention on Letters Rogatory, under the conditions set forth in this Article.

The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Protocol shall enter into force on the thirtieth day following the date on which two States Parties to the Convention have deposited their instruments of ratification or accession to this Protocol.

For each State ratifying or acceding to the Protocol after its entry into force, the Protocol shall enter into force on the thirtieth day following deposit by such State of its instrument of ratification or accession, provided that such State is a Party to the Convention.

Article 10

If a State Party has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Protocol, it may, at the time of signature, ratification or accession, declare that this Protocol shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations that shall expressly indicate the territorial unit or units to which this Protocol applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 11

This Protocol shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Protocol shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 12

The original instrument of this Protocol and its Annex (Forms A, B and C), the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the

Organization of American States, which will forward an authenticated copy of the text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of that Organization and the States that have acceded to the Protocol of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any. It shall also transmit to them the information mentioned in Article 2, the last paragraph of Article 3, and Article 6 and the declarations referred to in Article 10 of this Protocol.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE AT MONTEVIDEO, Republic of Uruguay, this eighth day of May, one thousand nine hundred and seventy-nine.

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM A

LETTER ROGATORY[1]

1
REQUESTING JUDICIAL OR OTHER ADJUDICATORY AUTHORITY
Name

Address

2
CASE:

DOCKET No.:

3
CENTRAL AUTHORITY OF THE STATE OF ORIGIN
Name

Address

4
CENTRAL AUTHORITY OF THE STATE OF DESTINATION
Name

Address

5
REQUESTING PARTY
Name

Address

---

[1] Complete the original and two copies of this form; if A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

6
COUNSEL TO THE REQUESTING PARTY
Name

Address

PERSON DESIGNATED TO ACT IN CONNECTION WITH THE LETTER ROGATORY

Name

Address

Is this person responsible for costs and expenses?
YES ___ NO ___
* If not, check in the amount of ___ is attached
*Or proof of payment is attached

The Central Authority signing this letter rogatory has the honor to transmit to you in triplicate the documents listed below and, in conformity with the Protocol to the Inter-American Convention on Letters Rogatory:

*A. Requests their prompt service on:

_____

_____

_____

The undersigned authority requests that service be carried out in the following manner:

_____

* Delete if inapplicable.

*(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the second paragraph of Article 10 of the above-mentioned Convention; or

_____

_____

_____

_____

*(2) By service personally on the identified addressee or, in the case of a legal entity, on its authorized agent; or

*(3) If the person or the authorized agent of the entity to be served is not found, service shall be made in accordance with the law of the State of destination.

*B. Requests the delivery of the documents listed below to the following judicial or administrative authority:

Authority: _____

_____

_____

*C. Requests the Central Authority of the State of destination to return to the Central Authority of the State of origin one copy of the documents listed below and attached to this letter rogatory, and an executed Certificate on the attached form C.

---

* Delete if inapplicable.

Done at ___ this ___ date of ___, 19___.

Signature and stamp of the judicial or other adjudicatory authority of the State of origin	Signature and stamp of the Central Authority of the State of origin

Title or other identification of each document to be delivered:

_____

_____

(Attach additional pages, if necessary.)

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM B

ESSENTIAL INFORMATION FOR THE ADDRESSEE[1]

To (Name and address of the person being served) _____

_____

You are hereby informed that (Brief statement of nature of service) _____

_____

_____

A copy of the letter rogatory that gives rise to the service or delivery of these documents is attached to this document. This copy also contains essential information for you. Also attached are copies of the complaint or

[1] Complete the original and two copies of this form; if A(1) is applicable, attach the original and two copies of the translation of this item in the language of the State of destination.

pleading initiating the action in which the letter rogatory was issued, of the documents attached to the complaint or pleading, and of any rulings that ordered the issuance of the letter rogatory.

ADDITIONAL INFORMATION

I*

FOR SERVICE

A. The document being served on you (original or copy) concerns the following:

_____

_____

B. The remedies sought or the amount in dispute is as follows:

_____

_____

C. By this service, you are requested:

_____

_____

D. * In case of service on you as a defendant you can answer the complaint before the judicial or other adjudicatory authority specified in Form A, Box 1 (State place, date and hour): _____

_____

*You are being summoned to appear as: _____

_____

* Delete if inapplicable.

*If some other action is being requested of the person served, please describe: _____

_____

_____

_____

E. If you fail to comply, the consequences might be:

_____

_____

_____

F. You are hereby informed that a defense counsel appointed by the Court or the following legal aid societies are available to you at the place where the proceeding is pending.

Name: _____

Address: _____

_____

The documents listed in Part III are being furnished to you so that you may better understand and defend your interests.

II*

FOR INFORMATION FROM JUDICIAL OR ADMINISTRATIVE AUTHORITY

To: _____

_____

_____

* Delete if inapplicable.

(Name and address of the judicial or administrative authority)

You are respectfully requested to furnish the undersigned authority with the following information: ____

_____

_____

_____

The documents listed in Part III are being furnished to you to facilitate your reply.

III

LIST OF ATTACHED DOCUMENTS

_____

_____

_____

_____

_____

_____

_____

_____

(Attach additional pages if necessary.)

Done at _____ this _____ day

of _____, 19_____

_____	_____
Signature and stamp of the judicial or other adjudicatory authority of the State of origin	Signature and stamp of the Central Authority of the State of origin

ANNEX TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

FORM C

CERTIFICATE OF EXECUTION[1]

To: _____

_____

_____

(Name and address of judicial or other adjudicatory authority that issued the letter rogatory)

In conformity with the Additional Protocol to the Inter-American Convention on Letters Rogatory, signed at Montevideo on May 8, 1979, and in accordance with the attached original letter rogatory, the undersigned Central Authority has the honor to certify the following:

*A. That one copy of the documents attached to this Certificate has been served or delivered as follows:

Date: _____

At (Address) _____

By one of the following methods authorized by the Convention.

*(1) In accordance with the special procedure or additional formalities that are described below, as provided for in the

---

* Delete if inapplicable.

[1] Complete the original and one copy to the language of the State of destination.

second paragraph of Article 10 of the above-mentioned Convention, or

_____

_____

_____

*(2) By service personally on the identified addresses or, in the case of a legal entity, on its authorized agent, or

*(3) If the person or the authorized agent of the entity to be served was not found, in accordance with the law of the State of destination: (Specify method used)

_____

_____

_____

_____

*B. That the document referred to in the letter rogatory have been delivered to:

Identity of person _____

_____

_____

Relationship to the addressee _____
(family, business or other)

_____

_____

* Delete if inapplicable.

*C. That the documents attached to the Certificate have not been served or delivered for the following reason(s):

_____

_____

_____

*D. In conformity with the Protocol, the party requesting execution of the letter rogatory is requested to pay the outstanding balance of costs in the amount indicated in the attached statement.

Done at _____ the ___ day of ___ 19 ___

_____

Signature and stamp of Central Authority of the State of destination

Where appropriate, attach originals or copies of any additional documents proving service or delivery, and identify them.

_____

* Delete if inapplicable.

No. 94-569

Supreme Court, U.S.
FILED
OCT 31 1994
CLERK

In The

Supreme Court of the United States

October Term, 1994

CASA VEERKAMP, S.A. DE C.V. and WALTHER VEERKAMP,

Petitioners,

vs.

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. and HERMES TRADING COMPANY d/b/a HERMES MUSIC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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1 PM

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Inter-American Convention on Letters Rogatory[1], including the Additional Protocol to the Inter-American Convention on Letters Rogatory, provide the only means for service of process transmitted from the United States to residents of other countries who are parties to this Convention.

---

1. The Inter-American Convention on Letters Rogatory (hereinafter "the Inter-American Convention" or "Convention"), was done at Panama City, Panama on January 30, 1975. The Additional Protocol on the Inter-American Convention on Letters Rogatory (hereinafter "the Additional Protocol") was done at Montevideo, Uruguay, on May 8, 1979. *See* __ U.S.T. __, S. Treaty Doc. No. 27, 98th Cong., 2d Sess. (1984). These treaties (Petitioners' Appendix pp. a53-a80) were entered into force in the United States on August 27, 1988.

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Other Authorities Cited:

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Restatement (3rd) of the Law of Foreign Relations § 325 (1986) 4

No. 94-569

In The

Supreme Court of the United States

October Term, 1994

CASA VEERKAMP, S.A. DE C.V. and WALTHER VEERKAMP,

Petitioners,

vs.

ALBERTO KREIMERMAN, HERMES INTERNATIONAL, INC. and HERMES TRADING COMPANY d/b/a HERMES MUSIC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Alberto Kreimerman, Hermes International, Inc.[2], and Hermes Trading Company, d/b/a Hermes Music, (hereinafter

2. Hermes International, Inc. and Hermes Trading Company have no parent or subsidiary corporations to disclose under Rule 29.1.

collectively "Kreimerman" or "Respondents"), responds to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the District Court (Petitioners Appendix pp. a33-a52) are not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix pp. a1-a32) is reported at 22 F.3d 634.

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF FACTS

As far as it is limited to the procedural history of the case, Petitioners' Statement of the Case ("Statement", beginning at page 2 of the Petition) is accurate. However, the Statement also contains Petitioners' version of the law governing this case, and Petitioners' conclusions about errors made by the Fifth Circuit Court of Appeals, all also stated in a factual manner. In this regard the Statement is merely argumentative and should not be considered fact. These arguments are properly part of the Reasons for Granting the Petition urged by the Petitioners. The Petitioners' statement of facts is consistent with, but more limited than, the facts set forth in the opinion of the Fifth Circuit Court of Appeals. The facts in the appellate opinion may lead to a better understanding of the case.

REASONS FOR DENYING THE WRIT

The Fifth Circuit Court of Appeals has correctly interpreted the Inter-American Convention as only one of various methods to serve process. While few judicial decisions discussing its applicability have been made, it is clear from the language of the text, as well as the insights which can be plainly drawn from the document itself, that the Inter-American Convention does not exclude other means for service of process.

I.

STANDARDS FOR INTERPRETATION OF TREATIES

Interpretation of a treaty is a question of law for the Court. *Bonnano v. United States*, 12 Cl. Ct. 769 (1987). The starting point in interpreting any treaty is the text itself. *United States v. Alvarez-Machain*, 504 U.S. __, __, 112 S. Ct. 2188, 2193-94, 119 L. Ed. 2d 441, 451-452 (1992); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989). The language used by the drafters of the treaty, as well as the context in which such language is used, must be examined first. *Eastern Airlines v. Floyd*, 499 U.S. 530, 534, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569 (1991). If any ambiguities or difficulties in constructions are encountered, extraneous documents, such as the treaty's history and negotiations, may be relevant in interpretation. *Air France v. Saks*, 470 U.S. 392, 397, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985) (*quoting Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943).

There exists some authority that "treaties are more liberally construed than contracts." *Air France* at p. 396. However, applicability of this rule is limited to circumstances involving ambiguous or uncertain provisions. As the Fifth Circuit recognizes, respect for the sovereign rights of the signatory or its

citizens dictates that treaties should be construed narrowly rather than broadly. (Opinion, Petitioners' Appendix p. a9). Petitioners complain that the Fifth Circuit has incorrectly limited its construction of the Inter-American Convention and paid "lip-service" to the rules of interpretation, particularly those specifying construction of provisions liberally as opposed to narrowly. In fact, the Fifth Circuit correctly stated this Court's rules with respect to interpreting treaties narrowly rather than broadly.

The primary focus for the Court is to determine the intent of the signatories to the treaty. This canon of interpretation is similar to that of the law of contracts. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984); *see also*, Restatement (2d) of the Law of Foreign Relations § 146 (1965); Restatement (3rd) of the Law of Foreign Relations § 325 (1986)[3].

The Fifth Circuit specified in its opinion that it did not rely on any specific rule of construction since the arguments heavily favored non-exclusivity of the treaty (Opinion, footnote 19; Petitioners' Appendix p. a10). The plain language of the Inter-American Convention, taken in context, mandates a determination that it is not the exclusive means for service of process.

---

3. Restatement (3rd) of the Law of Foreign Relations § 325 is based on Article 31 of the Vienna Convention on the Law of Treaties, May 22, 1969, 8 I.L.M. 4 (1969). Although the United States is not a party to this treaty, it does recognize that its substance codifies international law of treaties.

II.

ANALYSIS OF TEXT OF CONVENTION AND CONTEXT OF LANGUAGE USED

A. The Convention Expresses No Prohibition or Intent to Prohibit Other Means of Service of Process.

The Inter-American Convention does not contain a provision that expressly prohibits all other means of service of process in civil or commercial cases except as specified in the treaty itself. Article 2 of the Convention, entitled "Scope of the Convention," states that it "shall apply to all letters rogatory," but it *does not state* that letters rogatory are the only means for effecting service, nor does it contain any similar language. Petitioners themselves concede that this language alone does not preempt other means of service of process. (Petition p. 11). The only case presently reported which has addressed this specific issue is *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991), wherein the Florida District Court also concluded that the Inter-American Convention did not provide the exclusive means for service of process.

The convention does not express any intent that it is intended to preempt other means for service of process. The titles of the Convention and the Additional Protocol are illuminating: Inter-American Convention *on Letters Rogatory* and Additional Protocol on the Inter-American Convention *on Letters Rogatory* (emphasis added). The titles imply that the treaty relates solely to letters rogatory, rather than all or other mechanisms for service of process. In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987), this Court held that the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* ("the Hague Evidence Convention") was not the exclusive or mandatory means for obtaining documents or

information located in a foreign country. One of the important factors discussed by this Court was the conspicuous lack of expression as to any intent mandating usage of the procedures described therein. *Id.* at p. 535, footnote 19.

As indicated by their titles, neither the Convention nor the Additional Protocol discuss or refer to any other type of document for service, except letters rogatory. What is clear from the text of the Inter-American Convention is that *once* letters rogatory are issued certain procedures relating to service, execution and return must be followed. The Additional Protocol more particularly discusses preparation, transmission and cost of the letters rogatory. The notable absence of reference to other means of process from the text of the treaty does not mean that such other process was prohibited, but only that the Convention did not include them in the agreement.

B. The Additional Protocol to the Convention Does Not Specify Exclusivity.

Petitioners further argue that the text of the Preamble to the Additional Protocol and Article 1 of the Additional Protocol support the premise that service of process by letters rogatory under the Convention is exclusive. Petitioners misinterpret the effect of the Additional Protocol. Contrary to Petitioners' argument, the Additional Protocol is limited to specific acts under the Convention. When the United States ratified the Inter-American Convention, express reservations were made with respect to its assent.[4] These reservations are not at issue in the

---

4. The express reservations are as follows:

> 1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be

(Cont'd)

present case, but are important in explaining the significance of the Additional Protocol.

Petitioners rely upon Article 1 of the Additional Protocol (Petition page 11). Article 1 was drafted by the United States, and applies only to those acts under Article 2(a) of the Convention. Article 1 of the Additional Protocol provides:

> "This Protocol shall apply only to those procedural acts set forth in Article 2(a) of the Inter-American Convention on Letters Rogatory, hereinafter referred to as "the Convention". For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders, and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of a State Party to a judicial or administrative authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination."

(Cont'd)

excluded from the rights, obligations and operation of this Convention between the United States and any other State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone.

The Additional Protocol is intended to more clearly specify the procedures to be followed *if* letters rogatory are to be issued for service of process according to Article 2(a) of the Convention only. The language used in this section qualifies the term "procedural acts" to mean those that (i) are served "by a judicial or other adjudicatory authority of a State Party to a judicial or other adjudicatory authority of another State Party" and (ii) are transmitted by a letter rogatory from the Central Authority of one State Party to the Central Authority of another State Party. Other types of service (and other types of letters rogatory) are excluded. The Additional Protocol nowhere states or infers that the Convention is exclusive.

C. Articles 14 and 15 of the Convention Do Not Mandate Exclusivity of Letters Rogatory.

Petitioners place great emphasis on Articles 14 and 15 of the Convention, asserting that these provisions allow methods other than letters rogatory to serve process within certain exceptions and that Respondents' attempt to serve process did not meet the exceptions. Article 14 and 15, which are contained in the section of "General Provisions," are as follows:

"Article 14

> States Parties belonging to economic integration systems may agree directly between themselves upon special methods and procedures more expeditious than those provided for in this Convention. These agreements may be extended to included other States in the manner in which the Parties may agree.

Article 15

> This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favorable practices in this regard that may be followed by these States."

Notably, Article 14 contains permissive language such as "may agree" for those cases where States Parties agree between themselves for "special methods and procedures." Further, Article 14 allows other States Parties to join in any of these types of agreements, again using "may" to indicate such possibility. The provisions in Article 14 were not discussed by the Fifth Circuit because they simply are not applicable. These provisions clearly are permissive, and clearly extend to other express agreements not at issue here.

Article 15 provides that the Convention does not exclude presently existing or *future* bilateral or multilateral agreements relating to letters rogatory, and thereby permits alternative means for transmitting letters rogatory. More importantly, Article 15, expressly doe not "preclude the continuation of more favorable practices in this regard" among the States.

Petitioners argue that the Fifth Circuit erred by giving Article 15 an overly narrow construction and making six separate assertions why the Court of Appeals erred. On its face, this provision simply allows States to continue any "more favorable" practices in this regard which may already be followed by these States. Petitioners argue that the second clause of Article 15 requires that the States parties must have previously *agreed* (in bilateral or multilateral agreements) to allow these more favorable

acts to continue. Petitioners' interpretation is an overly limited reading of the section, because the section not only contemplates present agreements, but agreements to arise in the future. "States" therefore, as used in the second clause of Article 15 is very general in that it includes States that may sign agreements in the future, rather than only States which have bilateral or multilateral agreements then in effect. Under this interpretation and omitting the first clause, Article 15 reads as follows:

> "This Convention shall not . . . preclude the continuation of more favorable practices in this regard that may be followed by these States."

If the term "favorable practices in this regard" refers to all service of process, there is no limitation to pre-existing written agreements.

Alternatively, Respondents assert that the phrase "in this regard" refers to no more than the practice of serving letters rogatory. The only subject matter of both the Convention and the Additional Protocol are letters rogatory. The use of "in this regard" appearing in the second clause of Article 15 refers only to the practice of transmitting "letters rogatory" which appears in the preceding clause of Article 15.[5]

Petitioners finally allege that the Fifth Circuit failed to give sufficient weight to the State Department's comments to President Reagan when the treaty was submitted for signature and the advice and consent of the Senate. If these comments are to be considered, they still do not support Petitioners' argument because it is clear

---

5. Based on this Court's interpretation of a similar provision in Article 27 of the Hague Evidence Convention, the Fifth Circuit concluded Article 15 to affirmatively permit the States to *unilaterally* continue all existing practices for all service of process. (Petition Appendix, p. a16). *See Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 537-538.

that the State Department's comments are directed to "practices between states concerning letters rogatory." This specific language defeats Petitioners' interpretation of the comment. However, only if a provision is determined to be ambiguous will the rules of construction permit analysis of legislative history. *Air France v. Saks*, 470 U.S. at 397. If they are to be considered at all, the Fifth Circuit has adequately discussed this and other non-textual arguments. (Petition Appendix, pp. a19-a22).

III.

COMPARISON OF THE INTER-AMERICAN CONVENTION TO THE HAGUE EVIDENCE CONVENTION AND CONTRAST TO THE HAGUE SERVICE CONVENTION

Like the Hague Evidence Convention for purposes of discovery, the Inter-American Convention cannot be interpreted to be the sole means for service of process upon persons in Mexico or any of the States Parties. The analysis above regarding interpretation of the text of the treaty and how the words appear in context, without resort to extraneous materials, establishes that the treaty can be interpreted from the ordinary meaning of the words used.

Petitioners assert that the Inter-American Convention should be interpreted as this Court has interpreted the Hague Service Convention, which is the exclusive means for serving process in those countries which have ratified or signed that treaty. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 2108, 100 L. Ed. 2d 722 (1988). However, marked differences between Inter-American Convention and the Hague Service Convention preclude such interpretation.

The Convention is entitled the "Inter-American Convention

on Letters Rogatory," and is thus self-limiting. The Hague Service Convention officially is entitled the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," and the title is much broader in scope.

The Preambles to both conventions establish that their purposes are not similar. The Preamble to the Hague Service Convention is:

> "States signatory to the present convention, [D]esiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time. . ."

In contrast, the Preamble tc the Inter-American Convention states:

> "The Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:"

Comparison of the two Preambles also leads to the conclusion that the Hague Service Convention is intended to supersede all other means for service of process, but that the members of the Organization of American States have merely concurred regarding certain practices concerning the use of foreign letters rogatory within their individual borders.

The text of the Preamble to Inter-American Convention more closely resembles the Hague Evidence Convention, which has been determined to be a non-exclusive means for obtaining information and discovery in foreign countries. *See Societe Nationale Industrielle Aerospatiale,* 482 U.S. at 538. The

Preamble to the Hague Evidence Convention states:

> "The States signatory to the present Convention, [D]esiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose . . ."

The language in this Preamble merely indicates a desire to ease the process for discovery, rather than mandate a particular procedure to be used, and likewise, the Inter-American Convention merely formalizes an agreement with respect to letters rogatory. Neither Preamble contains the preemptory terms or language appearing in the Hague Service Convention that were so convincing to this Court in determining it was the exclusive means for effecting service of process in those countries who signed the treaty. *See Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. at 699.

The presence of an "escape clause" also indicates that the Hague Evidence Convention is not exclusive. *Societe Nationale Industrielle Aerospatiale* at 537. Such a clause is found in the Convention at Article 17:

> "Article 17
>
> The State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ("ordre public")."

The decision of the Fifth Circuit also relies upon this clause in the Convention (Petition Appendix, p. a18).

CONCLUSION

The Inter-American Convention has been properly interpreted by the Fifth Circuit Court of Appeals which concluded that the procedures set forth therein were not the exclusive means for effecting service of process in Mexico and other countries which have ratified or affirmed its provisions. The Petition for Writ of Certiorari filed by Walther Veerkamp and Casa Veerkamp S.A. de C.V. should be denied.

Respectfully submitted,

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